

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 PERSONALIZED MEDIA) ()
5 COMMUNICATIONS, LLC) (CIVIL DOCKET NO.
6) (2:15-CV-1366-JRG-RSP
7 VS.) (MARSHALL, TEXAS
8) ()
9 APPLE, INC.) (JUNE 28, 2016
10) (9:05 A.M.

11 CLAIM CONSTRUCTION HEARING
12 BEFORE THE HONORABLE JUDGE ROY S. PAYNE

13 UNITED STATES MAGISTRATE JUDGE

14

15 APPEARANCES:

16 FOR THE PLAINTIFF: (See Attorney Attendance Sheet docketed in
17 minutes of this hearing.)

18 FOR THE DEFENDANT: (See Attorney Attendance Sheet docketed in
19 minutes of this hearing.)

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1 LAW CLERK: All rise.

2 THE COURT: Good morning. Please be seated.

3 For the record, we're here for the claim construction
4 hearing in Personalized Media Communications versus Apple,
5 et al., which is consolidated under Case No. 2:15-1366.

6 Would counsel state their appearances for the record?

7 MR. CAPSHAW: Your Honor, Calvin Capshaw for PMC, and
8 I'll identify the people who will be speaking to the Court
9 today. Mr. Doug Kline from Goodwin Proctor.

10 MR. KLINE: Good morning.

11 THE COURT: Good morning.

12 MR. CAPSHAW: Ms. Jennifer Albert --

13 MS. ALBERT: Good morning, Your Honor.

14 MR. CAPSHAW: -- Goodwin Proctor.

15 THE COURT: Good morning.

16 MR. CAPSHAW: Ms. Lana Shiferman, Goodwin Proctor.

17 MS. SHIFERMAN: Good morning, Your Honor.

18 THE COURT: Morning.

19 MR. CAPSHAW: Joe Grinstein from Susman Godfrey.

20 MR. GRINSTEIN: Morning.

21 THE COURT: Good morning.

22 MR. CAPSHAW: Ming Xi from Susman Godfrey.

23 MS. XI: Good morning.

24 MR. CAPSHAW: I think that's all, Your Honor.

25 THE COURT: Thank you, Mr. Capshaw.

1 MR. GARDNER: Good morning, Your Honor. Allen Gardner
2 here for Apple. Sir, with me today is Mr. Marc Sernel --

3 MR. SERNEL: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. GARDNER: Joel Merkin.

6 MR. MERKIN: Morning.

7 MR. GARDNER: And Archit Shah.

8 MR. SHAH: Good morning, Your Honor.

9 MR. GARDNER: And, sir, we are ready to proceed.

10 THE COURT: All right. Thank you, Mr. Gardner.

11 MR. EVERINGHAM: Good morning, Your Honor. Chad
12 Everingham here on behalf of Vizio, TPV, and Hon Hai. I'm here
13 with Kevin McBride, who will be addressing the Court on the
14 claim construction issues.

15 MR. MCBRIDE: Good morning.

16 MR. EVERINGHAM: We also have Romeo Jennings and
17 Steve Zager here also from Akin Gump. And our client
18 representative, Mr. Avi Schwartz is here, as, well, from Vizio.

19 THE COURT: All right.

20 MR. EVERINGHAM: We're ready.

21 THE COURT: Thank you, Mr. Everingham.

22 All right. Let me also just state for the record that
23 earlier this morning, we distributed to counsel a set of
24 preliminary constructions of most of the terms.

25 The purpose of issuing those is not to dissuade the

1 parties from taking whatever positions they feel are
2 appropriate during this hearing but rather to let counsel know
3 where the Court is after the initial review of the briefs and
4 the record and to allow you to focus your time and attention
5 where you believe the Court may have most gone astray.

6 I do reserve the right to and not uncommonly do amend
7 these constructions based upon the arguments at the hearing.
8 So I hope that you'll take them in that spirit.

9 As I'm sure you know, I would like to hear the
10 arguments on a term-by-term basis, but I'm quite willing to
11 have you take them in whatever order counsel think is most
12 efficient and group them, if you think that would be helpful.

13 So having said that, I'll turn it over to counsel for
14 Plaintiff.

15 MR. KLINE: Thank you, Your Honor.

16 Consistent with the -- the helpful guidance you just
17 offered, we're going to start and go right to the first term
18 from the proposed order, which the Court characterized as the
19 decrypting or decryption terms, the decryption key term, and
20 the encrypted term.

21 And we're going to go first, Your Honor, and then I
22 think that we largely are going to go term-by-term, but from
23 time to time, I think counsel for Apple is likely to -- to lead
24 off the presentation, but in this case, PMC is going to lead
25 off the presentation.

1 THE COURT: All right, Mr. Kline.

2 MR. KLINE: So if we could turn directly, please, to
3 Slide 3.

4 So, Your Honor, as we said, we have decrypting,
5 decryption, we have encrypted, decryption key, and then
6 encrypted digital information transmission, although we don't
7 plan to spend any time arguing about encrypted digital
8 information transmission, and we will rest on our briefs on
9 that term.

10 I think that Apple is taking the same position there.

11 So focusing on the first three terms here.

12 Breaking them down, Your Honor, the first term,
13 "encrypted." As you know, PMC's proposed construction was a
14 method that uses a digital key in conjunction with an
15 associated algorithm to decipher -- that is, render
16 intelligible or usable -- digital data.

17 Apple had proposed deciphering, rendering intelligible
18 or usable, data using a key. The dispute between the parties,
19 Your Honor, has been whether decryption is an entirely digital
20 process conducted on entirely digital data.

21 As Your Honor is well aware, this is a large portfolio
22 of patents that all claim priority to two original
23 applications, one filed in 1981, the second filed in 1987 as a
24 continuation-in-part application. The four patents in this
25 law -- lawsuit all claim priority to one or both of those

1 applications.

2 And this issue, whether encryption is a digital
3 process, has been presented to a number of tribunals over the
4 years that have seen other patents in this -- in this family.

5 And as Your Honor, I'm sure, is well aware from the
6 briefing, each side has prior decisions that it can point to to
7 say that other Courts have agreed with us. PMC pointed out
8 places where the Board of Patent Appeals and Interferences and
9 other tribunals have agreed that encryption is an entirely
10 digital process, and Apple has pointed to decisions where
11 courts have not agreed that encryption is an entirely digital
12 processed.

13 So rather than count noses, Your Honor, of prior
14 decisions, it probably makes sense to look at some of the
15 primary source material and make a decision about what's
16 appropriate, independent of what prior Courts have done.

17 Decryption key, Your Honor, is digital data used by a
18 device or method in conjunction with an associated algorithm to
19 decipher encrypted digital information. Again, the dispute is
20 clear. Apple's proposal is simply that it's a key used for
21 deciphering, that is, rendering intelligible or use -- or
22 useable data.

23 I would point out, Your Honor, that nowhere does
24 either patent specification talk about decrypting analog data.
25 Every time the '81 specification or the '87 specification talks

1 about deciphering, if you will, digital data, it always talks
2 about that in the context of decrypting.

3 There is an example in the patent specification where
4 the -- the processes are compared and contrasted. Each side
5 has its view on what that paragraph in the specification means.

6 If we look at every other place in the specification,
7 though, Your Honor, it's quite clear that the inventors
8 consistently described decryption as a process that operates on
9 digital data. For example, in the '490 patent, Column 4 at
10 Lines 65 to 67, decryptors are described that may convert the
11 received information in part or in whole to other digital
12 information, according to preset methods or patents -- or
13 patterns.

14 At the '091 patent, Column 73, Lines 31 to 37, there
15 is an example described, Example No. 2, that explains before
16 the message is embedded at the program originating studio and
17 transmitted, the execution segment of the command and all of
18 the meter-monitor segment, except for the length-token, are
19 encrypted using standard encryption techniques well known in
20 the art that encrypt binary information.

21 Again, Your Honor, at the '91 (sic) patent, Column
22 148, around Lines 51 to 57, there's a reference to an Example 4
23 before the Wall Street message. Embedded at the Wall Street
24 Week program originating studio and transmitted, all
25 information of the execution segment, the meter-monitor

1 segment, and the program instruction set in the information
2 segment are encrypted, standard -- right, thank you -- standard
3 encryption techniques that encrypt binary information. Every
4 single time the patent specifications talk about encryption,
5 they refer to binary information.

6 We have Example 7, Your Honor, from the '091 patent.
7 The digital video information is doubly encrypted.

8 And here's an important part of the specification,
9 Your Honor -- it doesn't get much attention in the Defendants'
10 brief at all -- where the inventors clearly distinguished
11 digital encryption or decryption from analog scrambling and
12 descrambling. At the beginning of this section from the '091
13 patent, Your Honor, Columns 143, around Lines 20 to 30, various
14 scrambling means are well known in the art for scrambling,
15 usually the video portion of analog television transmissions,
16 in such a fashion that only subscriber stations with
17 appropriate descrambling means have capacity to tune suitably
18 to the television transmissions and display the transmitted
19 television image information.

20 So the first sentence here, Your Honor, talks about
21 scrambling and descrambling analog signals.

22 In contrast, the inventors went on to describe that
23 encryption/decryption means and methods are well known in the
24 art that can regulate the reception and use of, for example,
25 digital video and audio television transmissions, digital audio

1 radio and phonograph transmissions, digital broadcast print
2 transmission, and digital data communications.

3 THE COURT: Now, Mr. Kline, those are clearly just
4 exemplary discussions.

5 MR. KLINE: That's right, Your Honor.

6 THE COURT: You -- you've made reference to but not
7 really discussed the passage that appears to go the other way
8 from -- from Column 159 that was talked about in the briefs,
9 and maybe that's what you're --

10 MR. KLINE: I've got that up now, Your Honor.

11 THE COURT: -- moving to now.

12 MR. KLINE: Right.

13 THE COURT: All right.

14 MR. KLINE: Now, here is an example. There are
15 several examples described. The first, there's an example
16 where the decryption cipher key information may be computed in
17 other more complex fashions.

18 There's a second example from the middle of the
19 paragraph. It says: And, for example, the transmitted program
20 may be processed through fewer than three steps of decryption.
21 And then I think the language Your Honor is referring to, yet
22 another variation of the invention it describes, and, for
23 example, the Wall Street Week transmission may be of
24 conventional analog television. And the decryptors, 107, 224,
25 and 231, may be conventional descramblers well known in the art

1 that descramble analog television transmissions.

2 The inventors explained that in the case of an analog
3 television transmission, you can use descramblers. They never
4 say you can use decryptors for analog television, and they
5 never say you can use descrambling for digital television.

6 They say when you have analog television, you can use a
7 descrambler.

8 THE COURT: But doesn't that passage clearly indicate
9 that the decryptors can include analog descramblers?

10 MR. KLINE: It doesn't say, Your Honor, that the
11 decryptors can include analog descramblers --

12 THE COURT: It says that they may be them.

13 MR. KLINE: When it is analog television that you're
14 dealing with. It never says that you can use a decryptor on
15 digital television. It says if you're using analog television,
16 you can use a descrambler.

17 And this issue got a lot of attention during
18 prosecution, Your Honor, that I think is relevant.

19 THE COURT: All right.

20 MR. KLINE: As I mentioned, there are tribunals that
21 have heard this before. The Board of Patent Appeals and
22 Interferences in -- in a matter of the '825 patent, which is an
23 ancestor of the patents-in-suit, Your Honor, in the same family
24 was presented with that issue.

25 The issue was whether the terms "encryption" and

1 "decryption" are broad enough to read on scrambling and
2 descrambling. And the Board of Patent Appeals and
3 Interferences concluded that we conclude that encryption and
4 decryption are not broad enough to read on scrambling and
5 descrambling.

6 And how do they reach that conclusion, Your Honor?
7 For a variety of reasons, including that there was a disclaimer
8 during prosecution.

9 If we look at the '825 patent re-examination appeal
10 brief, Your Honor, and I have to actually -- I have to
11 apologize, Your Honor. I have to hand up copies of this. I
12 don't have an exhibit cite from the briefs, but I have multiple
13 copies.

14 THE COURT: All right.

15 MR. KLINE: Both for opposing counsel and for the
16 Court. I have to apologize, Your Honor. I have copies of the
17 binders for the Court.

18 THE COURT: All right.

19 MR. KLINE: So, Your Honor, turning to Slide 14 --
20 and, again, this comes from the appeal brief filed by PMC
21 during re-examination of the '825 patent, which is a parent to
22 the patents in the lawsuit.

23 The question was whether a reference the --
24 Aminetzah -- Aminetzah reference -- whether the Aminetzah
25 reference anticipated or rendered obvious certain claims that

1 were then pending, and PMC explained to the Patent Office in
2 that appeal brief that decrypting of encrypted signals recited
3 in Claim 15 of that patent relates to digital signals. The
4 Aminetzah reference discussing scrambling/unscrambling system
5 does not disclose or suggest the additional step recited at
6 Claim 15.

7 Scrambling and encryption are different terms in the
8 art. In particular, encryption relates to digital signals. In
9 fact, the claim constructions in the Harmon report and the
10 Peterson report both reflect the ordinary understanding in the
11 art that decryption pertains to digital signals, which is
12 different from descrambling which pertains to analog signals.
13 This is from an appeal brief filed in this family of patents,
14 Your Honor, nearly 10 years ago now by PMC.

15 Similarly, Your Honor, a related patent in the family,
16 the '277 patent -- and, again, I'm going to have to hand copies
17 of this.

18 THE COURT: And while you're doing that, tell me, does
19 this patent that we're discussing now claim priority to the
20 1981 or 1987?

21 MR. KLINE: Yes, to '81, Your Honor. The patent --
22 the terms in suit -- the patents-in-suit that include these
23 terms claim priority to the '81 application.

24 THE COURT: And that's the '635 and '088?

25 MR. KLINE: I believe so. '091, Your Honor.

1 THE COURT: You're saying the '091 claims priority to
2 the -- to 1981?

3 MR. KLINE: Yes, Your Honor.

4 THE COURT: Okay. And what about the '649, the same
5 thing?

6 MR. KLINE: It doesn't include this term -- and '649
7 is '87 priority.

8 THE COURT: All right.

9 MR. KLINE: At Slide 15, Your Honor, again, one of the
10 parents to the patents-in-suit, the '277 patent, was submitted
11 to re-examination, again, back November of 2008. In its reply
12 brief, PMC explained to the Patent Office about the exact same
13 specification that one of ordinary skill in the art would
14 understand that a decryptor -- that it decrypts signals as
15 interpreted in light of the specification does not include
16 analog scrambling and descrambling.

17 Here, the inventor expressly distinguished his use of
18 the terminology encryption/decryption from the
19 scrambling/descrambling shown in the reference that was at
20 issue at the time, Your Honor.

21 PMC explained that, in essence, the inventor expressly
22 advised the reader that by the terms "encryption" and
23 "decryption," he meant something beyond the conventional
24 scrambling/descrambling relied upon by the examiner. This was
25 a statement that PMC made to the Patent Office in connection

1 with re-examination of a parent application to the
2 patents-in-suit eight years ago, Your Honor.

3 So it was examples like this upon which the Board of
4 Patent Appeals and Interferences found that PMC had disclaimed
5 any right to claim that encryption might cover scrambling or
6 descrambling.

7 And I think finally, Your Honor, we have the
8 patent-in-suit -- one of the patents-in-suit itself. I have to
9 hand this up, as well, the '635 patent prosecution history, one
10 of the patents-in-suit, Your Honor, from an amendment and
11 request for consideration that PMC filed April 2nd, 2013. PMC
12 explained to the Patent Office that applicants note that
13 encryption is not disclosed anywhere in the specification of
14 the reference that was at issue.

15 The reference, Davidson, describes scrambling video
16 signals and converting analog audio signals to coded digital
17 audio signals but does not teach or suggest encryption.

18 Next quote, Your Honor, they went on to say that
19 applicants have consistently asserted in their previous
20 responses at the Board of Patent Appeals and Interferences that
21 the encryption and decryption require a digital signal. PMC
22 explained that the board considered the very same specification
23 in finding that encryption and decryption are limited to
24 digital applications. The board also held that encryption and
25 decryption are not broad enough to read on scrambling and

1 descrambling.

2 So, Your Honor, what we have is two patent
3 specifications that always talk about encryption with respect
4 to digital information. They never talk about descrambling
5 digital information.

6 There is one example in the specification that it says
7 when the Wall Street Week program is broadcast in analog
8 television, then descramblers can be used, but it does not --
9 and it makes the point, you can't use encryptors for that. You
10 use descramblers for that.

11 If there was any reasonable way to interpret the
12 specifications themselves either way, that was resolved by the
13 further prosecution history, Your Honor. We've seen statements
14 made in 2007 by PMC to the Patent Office in connection with
15 re-examination. We've seen statements made in 2008 that PMC
16 made to the Patent Office in 2008. We've seen a statement that
17 PMC made during prosecution of one of the patents-in-suit three
18 years ago, Your Honor, April 2nd of 2013, where PMC expressly
19 stated to the Patent Office that encryption and decryption are
20 not broad enough to read on scrambling and unscrambling.

21 If these patents on their face on the day they were
22 filed could have been construed to cover scrambling and
23 descrambling when they used the terms "encryption" and
24 "decryption" -- and we submit that they should not have been
25 construed that way -- but to any extent they could have been

1 construed that way on the day they were filed, that coverage
2 was disavowed, Your Honor, by the statements that we've
3 identified through the presentation and that tribunals such as
4 the Board of Patent Appeals and Interference relied upon in
5 finding that disavowal.

6 So the Court, with all due respect, Your Honor, should
7 reconsider the proposed construction, take a look at PMC's
8 proposed construction, and decryption or decrypting or
9 decryption and decryption keys, Your Honor, those are digital
10 activities that take place on digital data.

11 I'm happy to answer any questions Your Honor may have,
12 but I'm sure my friend for Apple has his own perspective.

13 THE COURT: No. The information you provided on the
14 prosecution history was helpful. And I'll consider it in
15 connection with your arguments, Mr. Kline.

16 MR. KLINE: Very good. Thank you, Your Honor.

17 MR. SERNEL: Your Honor, may I approach with the
18 slides?

19 THE COURT: Yes.

20 MR. SERNEL: May I proceed?

21 THE COURT: Yes, go ahead, Mr. Sernel.

22 MR. SERNEL: Good morning, Your Honor. Marcus Sernel
23 on behalf of Apple.

24 And dealing with the decrypting and decryption and
25 encrypted terms first, I'll get to decryption key in a minute

1 separately.

2 As Mr. Kline indicated, the dispute here is about
3 whether this fully digital concept should be read into the
4 claims through the requirement for digital keys and digital
5 data.

6 We are comfortable with your proposed construction for
7 decrypting and decryption.

8 I might suggest on decryption key an alternative
9 approach.

10 And then for encrypted, I think the concept of a
11 digital key leaked into there, and so I'd -- I'd like to
12 discuss that.

13 Your Honor hit on the -- the key point in the
14 specification that we think makes crystal clear that
15 descriptors may be conventional descramblers, making clear that
16 this is not a fully digital process. It is not limited to only
17 digital encryption/decryption techniques, that these scrambling
18 analog television transmissions is included within this. I
19 don't know how they could be clearer here in -- in making that
20 point in the specification.

21 In the intrinsic evidence, there's a lot of patents
22 cited on the face of the -- the asserted patents. These are
23 three examples. There are more examples where these came from,
24 but that's intrinsic evidence as part of the record. And you
25 can see here in patents from the time frame we're talking

1 about, these patents using the terms "encrypted," "scrambling,"
2 "unscrambling," "analog" interchangeably. And so clearly at
3 the time in -- in the '80s that we're talking about, these
4 terms -- it -- it wasn't a clear concept as Mr. Kline suggests
5 that encrypted/decrypted is strictly digital. Clearly, those
6 terms were used by people of skill in the art at the time to
7 refer to analog processes.

8 It's very interesting. We've got a -- a notebook
9 entry from the inventor, Mr. Harvey, where contemporaneous
10 essentially with the filing of the 1981 application, he wrote
11 in his notebook and made very, very clear what he intended when
12 he used the term "decryptor" and -- and the terms "decryption"
13 and "encryption" in his patent. And emphasized that by
14 decryption, he meant anything that serves as a means or methods
15 to decode, decrypt, decipher, or otherwise render an obscured
16 signal into a meaningful one.

17 So here we not only have the statement in the
18 specification, we have contemporaneous inventor notebook where
19 he's confirming that he was intending a broad application of
20 encryption/decryption, not thinking about it in the narrow way
21 that PMC would have you construe it to be a fully digital
22 process.

23 And then we cited in our briefs some dictionary
24 definitions where encryption and -- and scrambling, for
25 example, with the -- with the decryption and then that refers

1 to the deciphering definition, again, uses these terms
2 interchangeably.

3 As Mr. Kline indicated, there's been some Court
4 decisions previously on this exact issue. I would suggest that
5 all of the recent Court decisions, and this is one -- PMC
6 versus Motorola from the Eastern District of Texas a few years
7 ago that addressed these exact same issues, looking at
8 essentially the exact same evidence, these disclaimers, some
9 other things. And you can see here that in that case, the
10 Court rejected the attempt to read the encrypt/decrypt terms
11 to be limited to -- to digital data, again, citing some of
12 the evidence -- same evidence that Your Honor has in front of
13 you.

14 I would suggest that -- and Mr. Kline said that there
15 were these other Courts that went the other way. I'll get to
16 that in a minute, but I think, one, those are Courts that dealt
17 with this issue many years ago. Two, in some of those
18 instances, it was an agreed term, and so it wasn't even a
19 debate -- a dispute in those cases. It was agreed in at least
20 one of those cases that it would be a -- a digital process.
21 When it's been fought out recently, this has been the answer
22 every time.

23 And, again, the PTAB, there's been some recent IPR
24 decisions that have come down in -- in very similar related
25 patents stemming from the same specification, and the PTAB has

1 come down and construed decryptor to reject this concept that
2 it's fully digital and finding that it includes the
3 descrambling analog concept.

4 As you can see here, the BPAI decisions have also --
5 that -- that went PMC's way have recently been rejected by the
6 PTAB, the most recent PTAB decisions. And, again, these --
7 these arguments about disclaimer and statements made
8 disclaiming coverage of anything that's not digital, that's
9 been dealt with in some of these recent PTAB decisions, and
10 they have found no clear disclaimer in the -- in the various
11 prosecution history.

12 So although a lot of this evidence that I was handed
13 here today, I don't think, is was part of the -- the record, at
14 least it wasn't until just now, I think conceptually that issue
15 has been dealt with by previous Courts and the -- and the PTAB,
16 and it's been rejected that -- that there's any clear and
17 unmistakable disclaimer of claim coverage in the file
18 histories.

19 THE COURT: Mr. Sernel, do you know whether or not
20 those decisions considered all of the prosecution history that
21 Mr. Kline just went through?

22 MR. SERNEL: I don't know. I tend to think that at
23 least the last one that he handed up looked recent enough
24 that I -- I don't know that it was a part of those records. I
25 believe that at least some of what he handed me was considered,

1 and at least, like I said, conceptually, I think the same sort
2 of things were considered, but I -- I can't say for certain.

3 THE COURT: All right.

4 MR. SERNEL: So that's -- that's our argument on -- on
5 decryption and encryption. I think it's improper to read in
6 this digital requirement.

7 I would note that, again, we are comfortable with your
8 decrypting and decryption preliminary construction.

9 In terms of encrypted, I see that it -- it has
10 reference to a digital key. There are clearly ways to do this
11 with -- with things that are other than digital keys. And I
12 think the broad statements in the specification and the broad
13 statements in the contemporaneous invention notebook of
14 Mr. Harvey and the usage of the term in the various patents in
15 the intrinsic record emphasize that we shouldn't be reading in
16 digital into this construction at all either on the key side or
17 on the data side, and so I -- I -- with one slight modification
18 of encrypted, I think you've got it right. I think digital
19 should come out of -- of that proposed construction, as well.

20 In terms of decryption key, very quickly. On this
21 one, again, you did not read in a requirement for digital here,
22 so I think you've got that right in your preliminary.

23 Our suggestion, however, is that we don't think you
24 need to construe the term "key." And what your preliminary
25 does is essentially adopt this concept of data used by a device

1 in conjunction with an associated algorithm.

2 Generally speaking, I agree that that's what a key is.

3 However, the -- the vague nature of sort of data used with an
4 algorithm, I think, has the potential for leading to confusion
5 when we apply these claims and that construction down the road.

6 It is very clear what a key is, and I've got some statements

7 here from their own expert where we asked them the question:

8 Well, is -- is this a term that one of the -- of skill in the
9 art would know about?

10 Yes.

11 And -- and a person of skill in the art would
12 understand it without any further explanation?

13 Yes.

14 I don't think we need to construe the term "key." I
15 think by construing it, we will merely inject confusion and
16 potential mischief where we're applying data and algorithms to
17 things that really aren't keys.

18 I think -- I would suggest Your Honor follow what
19 happened in PMC versus Motorola where encrypt and decrypt were
20 construed with the term just "key" in them, and think that's
21 the better way to do it.

22 There is references to keys throughout our documents,
23 their documents. I think people know what that is. I think
24 it's just going to make it more difficult for the jury to
25 figure out what's going on if we add 15 words as a construction

1 of key rather than just adopting a construction that's got the
2 word "key" in it.

3 THE COURT: So tell me, though, what you're worried
4 about with respect to the construction of key?

5 MR. SERNEL: Like I said, it's hard to -- to explain
6 exactly. I think it's generally right that it is data used by
7 a device or method in conjunction with an associated algorithm.
8 I believe that those terms are vague, and so we could be
9 getting into a situation where it's any kind of data and then
10 any kind of algorithm, and then suddenly we're talking about
11 something that's not really a key anymore, when, you know, I
12 think it's a well understood term in the art that there are
13 keys. Again, our documents refer to keys all over the place.
14 And if they're pointing to those things as keys, we're good.

15 I just worry that introducing whatever that is, a
16 dozen words is just going to make this difficult case even more
17 difficult for a jury to try to get their arms around and apply
18 claim constructions and claims to prior art and accused
19 devices.

20 And that's all I have on that.

21 Encrypted digital information transmission, we are
22 okay with Your Honor's construction on that and -- and plan to
23 stand on the briefs on that.

24 THE COURT: All right.

25 MR. KLINE: Your Honor, if I could just answer a

1 question that -- that you had?

2 THE COURT: Certainly, you can respond.

3 MR. KLINE: If we could have -- if we could switch the
4 presentation. Thank you.

5 Your Honor asked whether the -- any of the prior
6 Courts or -- or the PTAB or the BPAI that had resolved --
7 answered this question considered the prosecution evidence that
8 I handed up, and Mr. Sernel referred to the Motorola decision.
9 I think that Motorola decision was from September of 2011.

10 Slide 16, Your Honor, is the amendment and response
11 filed by PMC in the '635 patent prosecution. The '635 patent
12 is a patent-in-suit. This response was filed April 2nd, 2013,
13 so after that Motorola decision. Certainly, by definition, it
14 could not have been considered by the Motorola Court, and it
15 was in that patent prosecution of one of the patents-in-suit
16 that in order to overcome cited art, PMC argued to the Patent
17 Office that encryption and decryption require a digital signal.

18 I have no doubt, Your Honor, that if under different
19 circumstances we were trying -- PMC was trying to assert
20 against an Apple process that was not digital, including claims
21 to encryption and decryption, that Apple would be arguing that
22 we disclaimed scope and that we are bound by the representation
23 that PMC made to the Patent Office in 2013 when it told the
24 Patent Office, in an effort to try to overcome cited art, that
25 encryption and decryption require a digital signal.

1 That's all I had, Your Honor.

2 THE COURT: Have these disclaimer arguments been
3 rejected by the Patent Office in any proceedings?

4 MR. KLINE: I don't believe that this specifically --
5 well, I'm being told maybe they have. I'm sorry, I don't want
6 to miss -- I don't know the answer to that question, Your
7 Honor.

8 THE COURT: Well, if they have, why should I reach a
9 different result?

10 MR. KLINE: Well, because, Your Honor, there has not
11 been any decision that is binding on this Court about what this
12 claims mean -- what this term means. The Federal Circuit has
13 never weighed in on this.

14 There is pending before the Federal Circuit right now
15 in, I think, a case involving Amazon as a Defendant an appeal
16 where this issue may get resolved, but none of the decisions
17 are binding on this Court.

18 And as is clear from both sides' presentations, Your
19 Honor, this decision -- this -- the Courts and the board has
20 considered this, and different Courts and different boards have
21 come out different ways. So I think it's incumbent upon us to
22 look at the primary source of material and make a decision that
23 is proper in view of the case law, in view of the facts as they
24 exist today.

25 And the facts as they exist today, the patent

1 prosecution history of one of the patents-in-suit includes this
2 disclaimer, and that is an express disavowal of encryption
3 covering anything other than a digital signal.

4 THE COURT: All right.

5 MR. KLINE: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. SERNEL: Your Honor, the next term we'd like to
8 argue is the -- the term to decrypt in a specific -- specific
9 fashion on the basis of said code.

10 This one is linked with the term determining a fashion
11 in which said receiver station locates a first decryption key.
12 We are okay with how Your Honor construed the second term, the
13 determining a fashion term, but I'd like to -- to speak briefly
14 to the first term, which is to decrypt in a specific fashion on
15 the basis of said code.

16 I think, Your Honor, on this one, your proposed
17 preliminary construction is on the right path, but doesn't
18 quite have it right, and that's why I'd like to -- to discuss
19 it.

20 The preliminary construction you have for the -- the
21 to decrypt in a specific fashion term is controlling how the
22 decryption occurs based on the received code. I generally
23 agree that that's what's going on, but I don't think your
24 preliminary proposed construction would quite fit into the
25 claims as it's been presented. If you plugged in your

1 construction for this term, I'm not sure it would quite make
2 sense in the context of the claim, and so I just wanted to talk
3 through that.

4 You can see here what -- this slide is actually based
5 on PMC's proposed construction, and I think it -- it makes the
6 point that I'd like to make also with -- with your preliminary
7 construction, which is when you attempt to inject PMC's
8 proposed construction, which, again, is controlling the
9 decrypting process through the selection of a decryptor, a
10 decryption key and/or a decryption algorithm, based on the
11 received code, I think if you look at the -- the intrinsic
12 evidence and look at the context of the claim, there's three
13 things there suggested by PMC, I believe the first two of which
14 aren't really consistent with the claim language itself.

15 What's really going on here is you're selecting a
16 decryption algorithm or a method based on the received code,
17 essentially how you're decrypting, selecting a decryptor. And
18 you can see here we plugged in their language to see if it --
19 it makes sense. Controlling a decryptor that decrypts
20 encrypted digital data, you can see the controlling of the
21 decrypting process, I think, sort of repeats that. That's part
22 of the problem I have with your preliminary.

23 But let's just look at the first option there of -- of
24 their proposed construction. Controlling a decryptor that
25 decrypts encrypted digital data through the selection of a

1 decryptor. I don't think that makes sense. And to the extent
2 that your preliminary construction could be read to include
3 that, I don't think it would make sense.

4 We already have a decryptor. We're controlling a
5 decryptor that decrypts, and then selecting a decryptor is not
6 decrypting any specific fashion on the basis of said code. We
7 already have the decryptor. It encrypts encrypted digital
8 data, and so selection of a decryptor or selection of a
9 decryption key is not doing what's called for in the claim,
10 which is to decrypt in a specific fashion on the basis of said
11 code.

12 I understand that Your Honor's preliminary where
13 you're saying controlling how the decryption occurs, I read
14 that to be consistent with what our proposal is, which is if
15 you go back, to decrypt with a method specified by said code
16 and some form of that to decrypt in a way specified by said
17 code if -- if you want to try to get the concept that's in your
18 preliminary in the right form so then when it's plugged into
19 the claim language, it fits in -- in the context and makes
20 sense, I'd suggest that there may be alterations of the way we
21 phrased it that would be -- we'd be comfortable with, and I
22 think it would be consistent with your proposed preliminary.

23 I don't think your proposed construction, as phrased
24 currently, one, fits contextually into the claim, and, two, I
25 think it continues to leave open this possibility that we're

1 going to have things like selection of a decryptor or selection
2 of a decryption key being a specific fashion of controlling a
3 decryptor to decrypt which I don't think makes any sense.

4 So, again, I'm -- I'm okay with the determining a
5 fashion preliminary construction. I've got that -- I've made
6 my points on the to decrypt in a specific fashion. I believe
7 it should be modified to both fit the contextual language and
8 be more consistent with how Apple has proposed it, which is
9 what we're talking about here is the method by which the
10 decryption is happening. There's different ways you could
11 phrase that consistent with your preliminary, but that's, I
12 think, the concept that should be -- should be recognized.

13 THE COURT: My concern with your choice of method is
14 that it may imply a certain complexity to it that the -- the
15 disputed term doesn't itself carry.

16 MR. SERNEL: And that -- and that's a fair point, Your
17 Honor. I don't -- I think that is what's talked about in the
18 intrinsic evidence. I think that is the right answer.

19 As I indicated, I think we would be comfortable with
20 something like if -- if you don't like the word "method," to
21 decrypt in a particular way specified by said code. That, I
22 think, would capture the concept sufficiently and would be a
23 different way of phrasing it that I think would be consistent
24 with the intrinsic evidence.

25 THE COURT: All right. Thank you, Mr. Sernel.

1 MS. ALBERT: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MS. ALBERT: Could we go to Slide 116, please? 116.

4 To decrypt in a specific fashion on the basis of said
5 code means controlling the decrypting process on the basis of
6 the received code, and the manners through which the decryption
7 process may be controlled by the received code include through
8 the selection of a decryptor, a decryption key or a decryption
9 algorithm based on the received code.

10 And Mr. Sernel mentioned that he didn't think that the
11 claim would make sense using Your Honor's proposed
12 construction, but the claim terms -- as we know, a method does
13 not necessarily require that the claim terms be performed in
14 the order in which they're recited.

15 So the controlling step could very well come before --
16 or the -- yeah, controlling step could very well come before
17 the -- the step that Mr. Sernel mentioned.

18 And, additionally, Your Honor, there are examples in
19 the specification where there are two decryptors that could be
20 used in the decryption process. So perhaps there's a step of
21 controlling a decryptor, and then there's another step of
22 selecting the decryptor.

23 And we'll see in the specification, the specification
24 makes clear that the received code could be used to control the
25 selection of a decryptor, the selection of a decryption key, or

1 the selection of a decryption algorithm.

2 As shown on Slide 117 -- or 118, pardon me, the 1981
3 specification at Column 14, Lines 10 through 27 describes an
4 example where the received code may select the decryptor 107
5 from among the other decryptors to perform decryption.

6 THE COURT: Well, what -- what problem would you have
7 with the alternatives that Mr. Sernel just mentioned about way
8 instead of method?

9 (Off the record discussion among counsel.)

10 MS. ALBERT: I think that the word "way" could
11 encompass that the decryption process may be controlled based
12 on the selection of a decryptor or the selection of a
13 decryption key or the selection of an algorithm. I think "way"
14 could encompass all three of those scenarios, and those are all
15 three of the scenarios in which the received code may control
16 the decryption process that are described in the specification.

17 We're -- we're -- you know, we are generally in
18 agreement with Your Honor's proposed construction because
19 it's -- it's more consistent with the language of the claim.

20 On Slide 119, we see that the received code may inform
21 the decryptor how to decrypt. So, you know, this example
22 describe -- this is an example where the received code is used
23 to tell the decryptor which method to use if the decryptor is
24 capable of multiple means of decryption.

25 So, Your Honor, we're -- it would be incorrect to

1 limit the claim term to decrypt in a specific fashion on the
2 basis of said code to only a situation where the received code
3 specifies the method of decryption, as Apple originally
4 proposed. As we see, the specification describes that the
5 received code may also provide a decryption key. It may
6 indicate which decrypt -- decryptor to use to perform
7 decryption, or it may specify which means to use if the
8 decryptor is capable of multiple decryption means.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Ms. Albert.

11 MR. SERNEL: Your Honor, just 10 seconds of rebuttal
12 to that, and then I'll turn the floor over to Mr. Merkin for
13 the next term.

14 The only thing I would disagree on Ms. -- Ms. Albert's
15 presentation is that my proposed change to -- to Apple's
16 construction adding the way, instead of the specified method, I
17 would completely disagree that that would cover selecting a
18 decryptor to do the decryption process. I think that doesn't
19 make any sense in the context of the claim. Same thing with
20 selecting a decryption key.

21 So I -- I disagree with her understanding of that, and
22 that, I think, circles back to why I believe that our proposed
23 language is the best language to make clear what's going on
24 here, which is the method. We'd be comfortable with the way,
25 but as I said, I would -- I think we interpret that differently

1 than -- than Ms. Albert would.

2 With that, I'd like to turn it over to Mr. Merkin to
3 deal with the next term, which is the remote source and remote
4 transmitter station terms.

5 THE COURT: All right.

6 MR. MERKIN: Your Honor, Joel Merkin on behalf of
7 Apple.

8 For the two remote terms -- on Slide 25, we've
9 identified a pair of issues. I want to just make a few brief
10 comments focusing on the second issue identified, does remote
11 require a different geographical location or does remote simply
12 mean separate.

13 I want to turn to the intrinsic support.

14 We can turn to Slide 29.

15 What we're looking at on Slide 29 is from the
16 background of the invention section of the '091 patent, and it
17 cites to a prior art reference, which I'll call the '480 prior
18 art reference, which refers to a remote keyboard. That's
19 highlighted. It refers to it again in the passage a little
20 lower.

21 What I've shown on the bottom of Slide 29 is that '480
22 prior art patent, and in Figure 1, the remote keyboard that's
23 being referred to in the specification is the remote control
24 keyboard CT. And what that is, is a remote control similar to
25 the remote control that I'm holding in my hand, and it is

1 remote from the receiver device in the sense that it is
2 separate from the receiver device. You generally would not
3 consider the remote control or remote keyboard to necessarily
4 be at a different geographical location from the receiver. And
5 so based on this usage of remote in the '091 specification,
6 it's clear that remote, when used in various terms encompasses
7 both things that are at a different geographical location and
8 things that are simply separate.

9 If we can turn to Slide 28.

10 I've highlighted -- in a very recent PTAB decision,
11 the PTAB has considered the term "remote" in the context of
12 similar terms from the same specification, and, again, rejected
13 that remote means the same as geographical separate location.
14 They said they do not mean the same thing? Nothing limits
15 the -- the term "remote" to any specified distance, and the
16 term "remote," as used, includes wireless devices -- it's at
17 the bottom of Slide 28 -- wireless devices that artisans of
18 ordinary skill term a remote control device, and that's relying
19 on the same evidence I just pointed to, the remote keyboard
20 passages from Slide 29.

21 Lastly, if we can turn to Slide 27, you'll see this
22 Court's prior construction for similar remote terms from the
23 Zynga case -- this is in 2013-- where remote data source was
24 construed to be a separate data source. Remote video source
25 was separate video source. Remote station construed to be a

1 separate station.

2 It's Apple's position that the separate construction
3 of remote equating remote with separate is more appropriate
4 than equating remote with a separate or different geographical
5 location.

6 MS. ALBERT: Let's turn to Slide 77, please.

7 Your Honor, we agree that the term "remote source"
8 means a source of information or data that's at a location
9 different from the receiver station.

10 And we also agree that the term "remote transmitter
11 station" means a station that is at a location different from a
12 receiver station that transmits programming or other
13 information.

14 Now, there is no instance in the patent specifications
15 where the word "remote," as used in connection with the
16 patented inventions, means anything other than geographically
17 distant. Indeed, the -- the references that my opposing
18 counsel pointed to are discussed in the background of the
19 invention section where the inventors are discussing the
20 deficiencies in the prior art.

21 Indeed, throughout the disclosure with reference to
22 the patented inventions, the disclosure contrasts local inputs,
23 such as the local input 225 shown in Figure 4 of the patent,
24 with remote sources of transmissions originating, for example,
25 from remote transmitter stations.

1 So it's clear in the context of the description in the
2 specification that remote in the context of the patented
3 inventions means a different location, not local to the
4 receiver station.

5 And let's -- I'm on Slide 78 now.

6 So, for example, as shown in the 1981 specification
7 at -- at Column 1, Lines 49 through 53, the term "remote" is
8 used to describe a remote geographic location.

9 As shown in Slide 79, there's another example from the
10 1981 specification at Column 8, Lines 46 through 55, where
11 remote is used to mean, again, a geographically distant
12 location.

13 And turning to Slide 80, here's an example from the
14 1987 specification at Column 159, Line 62, to Column 160, Line
15 4, where the disclosure contrasts a local station with a remote
16 station apparatus. And it's clear that the remote station
17 apparatus is not in the same geographic location as the local
18 station apparatus because it is being interrogated by
19 telephone.

20 So a construction which would define the term "remote
21 source" simply to mean a separate source, and the term "remote
22 transmitter station" to mean separately -- a separate
23 transmitter station would be inconsistent with the
24 specifications and would encompass sources local to the
25 receiver station, and those local sources were never described

1 by the inventors in connection with the patented inventions as
2 being remote.

3 So we submit that Your Honor's proposed constructions
4 are the correct ones.

5 Thank you.

6 THE COURT: Thank you, Ms. Albert.

7 MR. SERNEL: Your Honor, Marcus Sernel again for
8 Apple.

9 The next term in the order is the detecting set of
10 terms, and I will acknowledge, Your Honor, that your
11 preliminary reaction to this one was similar to my preliminary
12 reaction, that why do we need to construe detecting. As I dug
13 further into the evidence, I think I've concluded absolutely
14 that Apple's proposed construction is what's going on here.
15 Demodulating and identifying is what we're talking about when
16 we're detecting signals in these claims. And I'd like to go
17 through the evidence that led me to that conclusion, and I
18 think should lead you to change your preliminary to that
19 construction.

20 This shows up in a variety of places in the claims.
21 It's always in the context of detecting some kind of embedded
22 signal or information within an information transmission, and
23 so here's the various places in which it shows up.

24 Here's just a few examples of the context of the
25 claims in which this -- these "detecting" terms appear. Again,

1 it's detecting certain kinds of information or a signal within
2 an embedded -- embedded within a transmission.

3 What is going on with this concept of detecting? We
4 had a tech tutorial that we had submitted to Your Honor a
5 month or so ago. And what's always going on in every example
6 in the patent and what was going on in the 1980s when you were
7 talking about detecting was taking some kind of broadcast,
8 cable cast, some kind of signal and essentially de --
9 disaggregating the various signals that are baked into that
10 transmitted signal and then identifying -- so you're
11 demodulating the signal. You're taking the waveform, taking
12 the -- the digital or -- or analog video or audio signals, and
13 then also disaggregating the control signal. You're
14 demodulating that, essentially extracting out the information,
15 and then what you're doing is identifying the control signal.
16 That's what's going on in every one of these situations in the
17 claims. When you're detecting a signal embedded within a
18 transmission, you have to demodulate it, and then you have --
19 then you're identifying the signal.

20 And so in the -- in the briefing, PMC in their opening
21 brief pointed to the digital detectors that are in, for
22 example, Figure 2A of the patent as the place in which the
23 detection is happening. Where is this detecting step
24 happening? PMC was very clear in arguing in their opening
25 brief that's happening in the digital detector.

1 And their argument then was, well, look, there's a --
2 a box in front of the digital detectors that's an amplitude
3 demodulator, and so clearly the concept of demodulating isn't
4 included within the concept of detecting because, look, there's
5 a separate box for demodulating. So that was their argument in
6 their opening brief.

7 As you saw in our briefing, Your Honor, the issue of
8 what happens in these digital detectors was previously disputed
9 in prior cases. And, in fact, went up to an appeal of an ITC
10 determination in the -- the 1998 time frame. And you can see
11 here that PMC very, very clearly argued that what the digital
12 detector did and what it referred to was demodulation circuitry
13 for extracting digital information from a carrier signal. They
14 were very, very clear in arguing -- and this was actually in
15 response to an indefiniteness conclusion by the ITC. And so
16 they were -- they were arguing, no, there isn't a well
17 understood meaning, a person of skill in the art could
18 understand what this is, and the digital detector, they said,
19 was referring to demodulation circuitry.

20 And, again, later statements down below where they're
21 referring to their evidence, including PMC's expert saying very
22 clearly that a digital detector would include a demodulator.

23 And essentially what happens here, Your Honor, is when
24 you have one of these signals, you need to put it through
25 multiple steps of demodulation. You first need to take it off

1 the -- what is transmitted, basically a carrier signal, to get
2 the TV baseband signal, and then you still need to demodulate
3 it further in order to -- to get this control information and
4 the various signals or information that is talked about in the
5 claims.

6 What's going on in these digital -- digital detectors
7 very clearly includes a further step of demodulating.

8 Now, what happened then is -- is confusing to some
9 extent, but essentially what happened is the Federal Circuit
10 agreed with PMC in response to this argument that a detector
11 had a well known -- a digital detector had a well known mean --
12 meaning to a person of skill in the art.

13 THE COURT: They didn't accept the meaning that PMC
14 was putting forward.

15 MR. SERNEL: You are correct on that. And -- and as
16 you saw in what the -- the Federal Circuit said in a footnote,
17 they said, well, we're going to adopt this construction of
18 digital detector that had a meaning set forth in the
19 specification which said detecting information -- digital
20 information essentially.

21 And so from my standpoint, that essentially begs the
22 question of, okay, what does detecting mean? There's -- that
23 was defining digital detector, found a definition that included
24 detecting, and I would say, well, what does that detecting?
25 It's -- and there's two steps to detecting. It's demodulating

1 and identifying.

2 I would suggest that where they fought off this
3 estoppel or fought off this indefiniteness argument with an
4 argument as to a meaning that -- that Your Honor could find
5 that estoppel applies. I certainly think it's -- it's
6 persuasive evidence as to what is going on when we're talking
7 about detecting in these digital detectors.

8 THE COURT: Well, what is it that you're concerned
9 will be considered detecting if we don't limit it to
10 demodulation?

11 MR. SERNEL: Well, there are -- there are situations
12 where you're just -- you just have a signal, and -- and you --
13 you use a signal where you're not necessarily disaggregating it
14 or extracting it from a waveform or some carrier signal.

15 And so that's what's going on here in every situation
16 in the patent. You're -- you're having to extract it off of a
17 carrier signal, and if you're not doing that, we don't think
18 you're practicing the -- this invention or these claims.

19 THE COURT: Can you point to anything in the
20 specification where the patentee has disavowed any other means
21 of detecting beyond demodulation?

22 MR. SERNEL: Well, again, I would suggest that if
23 you're not demodulating, you're not detecting. I don't know of
24 any clear and unmistakable disclaimer. I'm arguing that
25 detecting, in the context of 1980s patent -- and we'll look at

1 dictionary definitions here in a minute. Detecting means
2 demodulating and identifying. That is its plain meaning.

3 THE COURT: All right.

4 MR. SERNEL: And you can see here, again, it's --
5 this -- this amplitude demodulator in -- in the various
6 embodiments is doing this first step of demodulation.

7 There's also a second step. And -- and, again, the
8 green box as we've indicated here in the slide color in the
9 digital detector, again, that's where PMC argues the detecting
10 step is happening. And that is where, as we saw in their clear
11 statements in the briefing in the prior case, is where
12 demodulation is happening. As well, there's demodulating and
13 identifying these digital signals in that green box that is
14 separate and apart from the yellow boxes, which are the
15 additional demodulators which is just taking it off the carrier
16 signal to begin with.

17 And you can see here, the -- the argument that we saw
18 in reply was, well, there are embodiments in the specification
19 that say you don't -- you don't need boxes 31 and 32. You
20 don't need a filter. You don't need box 32, a demodulator.
21 Essentially those functions are -- are built into the -- to the
22 TV receiver. And I think they're still done, but they're built
23 into another box in the system.

24 And so they said, look, this -- this is clear. You
25 don't need box 32 doing the amplitude demodulating, but that

1 doesn't answer the point of what's going on in -- in the green
2 boxes. They are still detecting information, and the way
3 they're doing that is by demodulating the signal further and
4 identifying the signals -- the embedded information in them.

5 And so I don't think this answers the point about
6 what's happening in the digital detector which PMC has
7 previously argued is demodulating a signal.

8 Here's a dictionary -- a couple of dictionary
9 definitions from the time. And, again, we're in the '80s.
10 We're in a technical field. And you can see here a dictionary
11 of computers, the -- detection is the procedure found in a
12 demodulator. Detection, see demodulation. That's what this is
13 in this context. Detection is demodulation.

14 I get it that lawyers and I had the same reaction to
15 start. When I look at the term "detecting," I'm not a person
16 of skill in the art in the '80s in this industry. I think,
17 okay, well, you know, detecting is -- is something that's going
18 to be broader than demodulating and identifying. When you look
19 at it from the perspective of a person of skill in the art in
20 the '80s, those are the definitions that control, and -- and
21 those include demodulation.

22 You can see even in PMC's dictionary that they cited,
23 and I think this is -- this was also potentially cited by the
24 Federal Circuit, that a definition there also says demodulator,
25 straight up. And in this context, that is the right definition

1 to apply here.

2 THE COURT: I mean, but the Federal Circuit itself did
3 not limit it to demodulation, right?

4 MR. SERNEL: Again, they -- they interpreted digital
5 detector, and they kind of gave a circular definition, which
6 was detecting a digital signal. We are now looking at the term
7 "detecting" itself. And the term "detecting" itself, I
8 suggest, it's very clear both in PMC's statements, the -- the
9 dictionary definitions, how it's used, it's always demodulating
10 a signal from a carrier and then identifying the embedded
11 information or the control signal.

12 And you can see here we asked inventor Harvey in his
13 deposition this question, and he agreed that the term
14 "detect" -- one -- one function of -- of detecting with the
15 incoming signals would be to demodulate the analog signal, the
16 waveform, and then identify the signals. He didn't -- didn't
17 disagree with that.

18 So, again, I -- I believe I -- I understand why you
19 came out where you did on your preliminary construction. We
20 believe when you dig further into the evidence, what's going
21 on with detecting in this context is demodulating and
22 identifying the various signals in the claims in which that
23 term is used.

24 THE COURT: All right. Thank you, Mr. Sernel.

25 MR. KLINE: Thank you, Your Honor. We certainly agree

1 with the Court that the term "detecting" needs no further
2 construction. We agree with Apple's counsel's initial
3 instinct on this matter that the term requires no further
4 construction.

5 For all the discussion about the Federal Circuit, the
6 Federal Circuit was not asked to construe detect or detecting.
7 It was asked to construe detector. The term before the Court
8 here is detecting. And the Federal Circuit, even with respect
9 to the term detector, did not construe it in a manner that
10 Apple suggests this Court ought to construe detecting.

11 What we're left with, Your Honor, is an argument from
12 Apple that detecting requires demodulation because they say so.
13 The patent doesn't say that. Apple just comes here and says we
14 say that's how it works.

15 If you look at Figure 2A of the -- of the '091 patent,
16 plainly, the -- the demodulator's -- amplitude demodulator 32
17 is separate from the digital detector 38. It is separate from
18 the digital detector 34. And, in fact, before you get to the
19 digital detector 37, which is to follow Path B in Figure 2A,
20 the signal has to pass through two demodulators, amplitude
21 demodulator 32 and audio demodulator 35.

22 And, Your Honor, this is a depiction of the decoder
23 30, which is shown in Figure 2. And that becomes important to
24 some later slide. So the patent plainly explains that the
25 digital detector is different from the demodulator.

1 At Columns 18, Lines 56 to 61 of the '091 patent, with
2 reference to this figure, it explains that line receiver 33 --
3 if I come back, Your Honor, you can see line receiver 33 in
4 about the middle of the figure. The patent describes that line
5 receiver 33 receives the information only of that portion or
6 portions of the overall video transmission and passes that
7 information to a digital detector 34 which acts to detect the
8 digital signal. It doesn't say to demodulate the signal. It
9 says simply to detect the signal.

10 Later, demodulation, again, is described as separate
11 from detection. The television signal -- this is Column 18 of
12 the '091 patent. The television signal then passes to a
13 standard amplitude demodulator 32, which uses standard
14 demodulator techniques well known in the art, to define the
15 television baseband signal. And that's what demodulation does,
16 Your Honor. It brings the signal down to a baseband.

17 The patent goes on to describe this baseband signal is
18 then transferred through separate paths through three separate
19 detector devices where the detector does need to determine the
20 presence of an embedded signal.

21 The apparatus of these separate paths are designed to
22 act on the particular frequency ranges in which the embedded
23 signal information may be found.

24 Column 19, Lines 3 through 10, the patent describes
25 that the digital detector 37 detects signal information. Later

1 in the same section, shown on the slide, it describes that a
2 digital detector 38 detects signal information.

3 Now, it's interesting that Apple points to the
4 specific portions of the specification where it describes that
5 the decoders may omit demodulators. This is the '091 patent,
6 Your Honor, Column 47 around Line 6 -- beginning around Line 61
7 on Slide 27.

8 Receiving the embedded binary information at decoder
9 203, which does not include a filter 31 or a demodulator 32,
10 but then later describes the digital detector 34 automatically
11 detects the binary information. So we have a description in
12 the patent specification of detection occurring without
13 demodulation.

14 And, again, another example, Your Honor, Column 162 of
15 the '091 patent, any given decoder -- at Slide 28. Any given
16 decoder may have more or less apparatus than that shown in
17 Figures 2A -- that should be 2B, Your Honor, or 2C, and later,
18 as emphasized on the slide, said decoders do not require
19 filters 31 and demodulators 32.

20 At one point in Apple's brief, Your Honor, they argue
21 that PMC's own expert acknowledges that detecting had a
22 particular technical meaning to a person of ordinary skill in
23 the art at the time of the invention. This is at Page 11 of
24 Apple's brief. And they cite Exhibit 9, the Weaver transcript,
25 Page 115, around Lines 8 through 12.

1 And what they're citing there, Your Honor, is only
2 when Mr. Weaver was asked: Now, detecting has a particular
3 technical meaning to one of skill in the art in the 1980s,
4 doesn't it?

5 And he answered: Yes.

6 Apple chose not to ask the Court to read further where
7 the very next question he was asked was: And it means
8 demodulating, doesn't it?

9 And he answered: No.

10 He was asked: What does it mean?

11 And he answered: Determining whether something
12 exists.

13 So, Your Honor, it seems clear to us that the Court's
14 proposal that the term needs no further construction and that
15 detecting simply means determining whether something exists
16 which is ordinary skill. Let's not forget, Your Honor, the
17 task is to make this job as straightforward for the jury as it
18 can be. And construing detecting to require demodulating and
19 identifying both would be incorrect as a matter of law, and it
20 certainly wouldn't help this jury understand any more clearly
21 what detecting means.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Mr. Kline.

24 MR. SERNEL: If we could go to -- to programming.

25 I think I had addressed Mr. Kline's points in my

1 presentation.

2 THE COURT: All right.

3 MR. SERNEL: The reference to demodulators, that's not
4 talking about the demodulating that's happening in the digital
5 detector. So I'll stand on my prior argument on that.

6 In terms of programming, Your Honor, we are -- this
7 one is -- is a little bit complicated. Programming appears
8 across multiple patents. And we are comfortable with Your
9 Honor's preliminary construction insofar as it relates to
10 patents claiming priority to the 1987 patent application.

11 I would like to address the construction insofar as
12 you -- you would suggest applying it to patents claiming
13 priority to the 1981 specification.

14 And I'll note that Your Honor may have seen the filing
15 yesterday that indicates that previously, PMC had been arguing
16 that the '091 patent was -- had a priority date of 1987.
17 Yesterday, we received a document from them indicating they're
18 now going to change their claim of priority to 1981. I'm still
19 wrestling with exactly how we'll deal with that and whether
20 it's proper to -- to change to a different argument now.

21 I think there are actually clearer statements in
22 the -- the prosecution history of that patent saying that
23 they've disclaimed any claim to priority to 1981, but for
24 purposes of today's presentation, I don't think you're going to
25 sort out disputes as to what the priority dates for these

1 various patents are, and we certainly don't agree to them. We
2 will just argue in terms of something that's based on 1981,
3 something that's based on 1987, and what's the proper
4 conclusion for both.

5 And you can see here that previously in -- in the
6 Amazon IPR decisions, the patent owner had not disputed that
7 the '81 specification defined programming differently than the
8 1987 specification. And so the issue for the 1981
9 specification and -- and patents claiming priority to the 1981
10 specification is whether the programming definition in the --
11 and, actually, this is a typo -- '87 specification should apply
12 where the priority date is a claim to '81.

13 So let's look at the 1981 specification, and here's
14 the abstract. And you can see here there's a pretty
15 straightforward statement that programming here -- and this is
16 in the abstract. This is -- the abstract is a summary of
17 the -- the invention set forth in the patent specification.

18 Programming here means everything transmitted over
19 television or radio intended for communication of entertainment
20 or to instruct or to inform.

21 There was some argument in the briefing by PMC that,
22 well, because it appears in the abstract, it doesn't get as
23 much weight as if it appeared somewhere else. The Federal
24 Circuit has addressed that issue in prior cases in saying they
25 frequently look to the abstract to determine the scope of the

1 invention, and you should certainly look to the abstract in
2 this definition here to determine what the proper definition
3 for this term is for the -- the patents claiming priority to
4 1981.

5 I think it's just a black letter law that you can't
6 write into a continuation-in-part application information. And
7 what they did was they included a definition in their 1987
8 patent application, and then put that information into a time
9 machine and put it back into a patent claiming priority to the
10 1981 priority filing.

11 If we're going to go to trial on patents claiming
12 priority to 1981 and there's a 1981 priority date that applies,
13 the 1987 specification is as -- is as if it doesn't even exist.
14 And so to take that definition and to transport it in time back
15 to a patent claiming priority to 1981 I think is completely
16 wrong and can't happen.

17 I think you have to look to the 1981 abstract and the
18 1981 specification to define what this term means in that
19 context. And, again, we're in the 1980s. Things may be
20 evolving over time.

21 And where they acted as their own lexicographer, I
22 agree, they can define this term. They did it in '87. That's
23 going to control for '87. They also did it in 1981, and that
24 should control for 1981 equally.

25 THE COURT: Aren't there disclosures in the 1981

1 specification that are broader than this language that you're
2 citing to in the abstract?

3 MR. SERNEL: So two answers to that. One, I would say
4 even if there are, when -- when a patentee acts as his own
5 lexicographer and defines a term, that controls. You don't
6 look to other things in the specification to say, well, we're
7 going to adjust it. When you define a term, that controls.
8 The Federal Circuit says that.

9 And then I think also when you look at the -- the
10 various places where they suggest that programming might be
11 something else, I think it's always done in the context of
12 television or radio programming. And when you look at -- at
13 the context and -- and when they refer to computer programming
14 or computers or -- or different transmission systems, it always
15 circles back when you look at the context to -- to television
16 programming and radio programming.

17 And so I would suggest even if you look beyond and --
18 and find that there's not an express definition, I think as an
19 express definition, it's clear as a bell that -- that it is an
20 express definition, it controls. Even if you look beyond that
21 and want to look at the totality, I think what's talked about
22 in that '81 specification is focused on TV and -- and radio
23 programming, and that's a proper definition to control.

24 THE COURT: Doesn't it talk about books?

25 MR. SERNEL: I don't know that that talks about that

1 in the context of programming per se.

2 THE COURT: Well, let me see, I made a note about
3 Column 21 through 22 of the '490.

4 MR. SERNEL: And, again, I would have to look at this,
5 Your Honor. I don't have a slide on it. I apologize. It
6 would look -- it would appear to me that it's talking about it
7 in the terms of videos and -- and potentially TV, and then
8 combining that with this book store concept. Again, I think
9 the definition in the abstract controls. You don't even need
10 to wrestle with the more difficult question of what is the
11 totality of the specification telling you. But I think reading
12 that definition as a definition is consistent with the
13 specification. It focuses principally on TV and radio
14 programming.

15 THE COURT: Okay.

16 MR. KLINE: Just a couple of quick points, Your Honor.
17 We largely rest on our briefs on this point.

18 If -- if you could go to Slide 41, please. Thank you.

19 So this is -- this is the abstract from the 1981
20 specification. The language that counsel is relying upon is a
21 parenthetical within the abstract. The parenthetical refers to
22 the preceding sentence as -- as likely as anything else. The
23 first sentence of the abstract is: Apparatus and methods for
24 automatically controlling programming transmissions and
25 presentations on television and radio equipment and monitoring

1 the programming transmitted and presented. Parenthetical,
2 programming here means everything transmitted over television
3 or radio intended for communication of entertainment or to
4 instruct or to -- or inform.

5 So the abstract is explaining that with respect to
6 apparatus and methods for automatically controlling programming
7 transmissions and presentations on television and radio
8 equipment, programming there means everything transmitted over
9 television or radio intended to communicate, to entertain, to
10 instruct, or to inform.

11 If we go on, Your Honor, you said aren't there other
12 examples in the patent specification than television and radio
13 programming? And there are, there are a few.

14 At Slide 42, there's one. Column 490 -- sorry,
15 Column 16 of the '490 patent. For example, TV set 131 may
16 receive programming from many sources, including cable
17 converter box 133, video cassette recorder 135, and videodisc
18 player 137.

19 And to the section of the specification that Your
20 Honor referred to just a moment ago at Slide 43, absolutely,
21 one of the examples for carrying out the patented invention
22 that inventors Harvey and Cuddihy thought of was rather than
23 book stores stocking books, they might stock video desks --
24 discs with the books on them, and a customer could come into
25 the book store and ask to buy a title, hypothetically, How to

1 Grow Grass. And it could be delivered to the customer in the
2 book store by instructing a laser videodisc system 232 to
3 transmit its encrypted copy of How to Grow Grass to printer or
4 other means 221.

5 So Your Honor, in our view, has the claim -- the
6 proposed claim construction is correct. It's not limited even
7 for patents relying on the 1981 spec solely to things that can
8 be transmitted over television and radio. That would let out
9 many examples in the specification.

10 THE COURT: What do you say, Mr. Kline, to the
11 argument that under Federal Circuit precedent, if it's a
12 defined term, that should be the end of the analysis?

13 MR. KLINE: Well, of course, the MPEP at the time said
14 not to rely on the abstract for construing the claims. We do
15 have that Federal Circuit case. And what I would say, Your
16 Honor, is if we have an example where arguably the patent might
17 be interpreted in ways that conflict or ways that don't
18 conflict, then the better course is to interpret the patent in
19 a way that is consistent. And the way to interpret this
20 abstract in a manner that is consistent with the specification
21 is that the parenthetical refers only to the preceding
22 sentence, not to the invention in all the ways it may be
23 carried out as further described in the specification.

24 The abstract starts with apparatus and methods for
25 controlling programming transmissions and presentations on

1 television and radio equipment. The parenthetical says
2 programming here means everything transmitted over television
3 or radio intended to communicate, entertain, or to instruct or
4 to inform. The inventors wanted to make clear that with
5 respect to programming transmissions and presentations on
6 television and radio equipment, it was everything. But they
7 went on to describe in their specification other embodiments of
8 the invention, such as video laser disc players, printing
9 books, things of that nature, which is consistent with the
10 Court's construction.

11 THE COURT: All right.

12 MR. KLINE: Thank you, Your Honor.

13 And then I think I'm up for tuning. Is that -- do we
14 agree on that, Marc?

15 THE COURT: Why don't -- before we proceed with
16 tuning, we'll take the morning recess.

17 MR. KLINE: Very good. Thank you, Your Honor.

18 THE COURT: Thank you.

19 LAW CLERK: All rise.

20 (Recess.)

21 LAW CLERK: All rise.

22 THE COURT: Thank you. Please be seated.

23 All right. I think, Mr. Kline, I interrupted you when
24 you were moving on to the "tuning" term, I believe.

25 MR. KLINE: Thank you, Your Honor. We largely are

1 going to rest on our briefs on tuning, though there is just one
2 point I would like to draw the Court's attention to.

3 We're at Slide 44 of our presentation.

4 The Court's proposed construction for tuning is
5 selecting a frequency for said receiver station to receive
6 programming. I'd like to just draw the Court's attention to --
7 in the '091 patent, Column 215, around Lines 56 to 65.

8 There is a reference to the apparatus where it may
9 tune to the transmission of a selected digital data channel.
10 And there's no limitation that that data channel must be a
11 certain frequency. It's just described as tuning to a selected
12 digital data channel.

13 We had submitted with our -- our brief at Exhibit O a
14 contemporaneous definition of channel, a -- just simply a path
15 along which signals can be sent, for example, a data channel or
16 an output channel. So we just would like to draw the Court's
17 attention to that and suggest that tuning a receiver to a
18 station -- tuning the receiver station to a channel is broader
19 than simply selecting a frequency.

20 THE COURT: All right. And what was that passage that
21 you just referred to on the previous slide?

22 MR. KLINE: That's at the '091 patent, Your Honor,
23 Column 215, around Lines 56 to 65. And there's an express
24 reference that the apparatus may tune to the transmission of a
25 selected digital data channel.

1 THE COURT: All right.

2 MR. KLINE: Thank you.

3 THE COURT: Thank you.

4 MR. SERNEL: Your Honor, Marc Sernel on behalf of
5 Apple.

6 We think your -- your preliminary construction on this
7 one is right on. It adopted Apple's proposed construction.
8 Tuning to a channel is selecting a frequency for said receiver
9 station to receive programming.

10 I'm going to quickly go through my slides, and then --
11 and then answer Mr. Kline's citation to the specification.

12 There are many places in the specification where when
13 they talk about tuning to something, you're tuning to a
14 selected frequency. Time and time again tuners tune to given
15 frequencies in the specification.

16 Dictionary definitions are aligned. Tuning is the
17 adjustment relating to frequency to adjust for residence at a
18 desired frequency.

19 Again, channels are associated with frequencies, as
20 well. And so the reference to the digital channel that
21 Mr. Kline pointed to when the specification is talking about
22 that, the channels are transmitted at assigned television
23 frequencies, and that's how it's done when you transmit
24 multiple channels.

25 And you can see, we have inventor testimony agreeing

1 with that construction, as well. More dictionary definitions.

2 And then I want to quickly get to Mr. Kline's passage.

3 The -- the passage here on the left is what Mr. Kline just
4 pointed Your Honor to in terms of a reference to digital --
5 digital data Channels A and B. If you actually look at a later
6 discussion of the same embodiment in the specification, it's
7 referring to the receipt of a transmission of a particular
8 television frequency transmission.

9 That's the way -- even if you're talking in the terms
10 of digital data channels, they are going to be communicated
11 either over the air or through a cable. When you have
12 channels, you're need -- you need to put them on separate
13 frequencies. And when you tune to them, you're tuning to a
14 selected frequency.

15 So we believe your proposed preliminary construction
16 is correct, and Mr. Kline's citation is not inconsistent with
17 that. It's entirely consistent with it, if you look at the
18 entire context of that embodiment.

19 THE COURT: All right.

20 MR. KLINE: Just briefly, Your Honor. And that
21 section of the specification referred to by Apple is an example
22 where we're still receiving programming. And maybe the
23 programming is coming in on a frequency, but we've seen other
24 examples where -- and I -- I should say, it's television
25 programming in that instance where it may be coming in on a

1 frequency. But we've seen examples where a book may be
2 downloaded, and there's certainly no requirement that the book
3 would come in on a digital channel that was coming in at a
4 frequency. It could just be tuned, as described earlier in the
5 spec.

6 I think this comes up a little more when we talk about
7 television receiver. And we had just agreed during the break,
8 if it's okay with the Court, maybe we could go from tuning to
9 television receiver.

10 THE COURT: All right.

11 MR. SERNEL: So on this one, Your Honor, television
12 receiver, it's in the preamble. There's no dispute that the
13 preamble is limiting.

14 Your Honor said that no construction is necessary.

15 We believe that the term should be given the
16 construction a receiver that can be tuned to a television
17 frequency. We believe that is the plain meaning and -- and
18 that you should adopt that specific construction.

19 We've looked at prior PMC statements in prior cases.
20 This is another one where PMC made arguments that a television
21 receiver should be interpreted to refer to the tuner portion of
22 a regular television set. That's what a television receiver
23 is.

24 You can see here another statement finding that the
25 ALJ construes the phrase "television receiver" as directed to a

1 tuner that outputs conventional audio and composite video
2 transmission. That's what it does. It's -- it's tuning, and
3 then tuning to a selected frequency.

4 Again, this is just a -- a reference to the -- what's
5 happening in the specification. And, again, same -- same
6 evidence that I just pointed you to. Television receivers,
7 what do they do? They tune to given frequencies.

8 And so it ties in this concept of tuning. We just
9 talked about the tuning to a channel construction. We believe
10 television receiver should get a similar construction. That's
11 what television receivers do, they tune to selected
12 frequencies. There's more evidence where this came from, but
13 I'm not going to go through all of these citations. We cited
14 them all in our brief. But time and again that's what it's
15 talking about here, a television receiver tuning to
16 frequencies.

17 Again, Inventor Harvey, when asked the question: And
18 a television receiver would be a receiver that can be tuned to
19 a particular television channel or frequency; is that correct?

20 And he answers: If you are saying that it can receive
21 a television signal and is tuneable, I think that's correct.

22 And then further clarifying: When you say tuneable,
23 that would be tuneable to a frequency, a television frequency,
24 correct?

25 He says: Yes.

1 And, again, this is the same issue with respect to
2 the -- the evidence we just talked about. We don't think the
3 references to digital data channels is inconsistent with having
4 a television receiver tuned to a frequency. That is the way
5 even digital information is communicated over the air or
6 through a cable. You need to do it at -- at different
7 frequencies, and so a television receiver is -- is tuning to a
8 selected frequency.

9 So we believe television receiver does require a
10 construction. We believe saying that no construction is
11 necessary will leave open potential arguments that are
12 improper. We believe it should be construed to require
13 selection of a selected frequency.

14 MS. BONN: Good morning, Your Honor. Amanda Bonn with
15 Susman Godfrey, and I'll be addressing television receiver.

16 If we could take a look at Slide 102, please.

17 So, Your Honor --

18 Thank you.

19 So, Your Honor, we -- we agree with the Court that no
20 construction is necessary. Our position is the plain and
21 ordinary meaning of television receiver applies. And I think
22 that there's -- there's sort of two disputes that come up,
23 and -- but the one that Apple has tuned into today is the issue
24 of whether a television receiver has to tune to a specific
25 frequency. And there are a few problems with that

1 construction.

2 So one issue is that the claim itself -- for example,
3 Claim 39 -- doesn't have any tuning or frequency limitation.
4 So it's reading in or importing an additional limitation into
5 the claim language that's not there. And we see that that's a
6 problem because in the specification, there are different
7 embodiments where a TV receiver and a TV tuner are two separate
8 components, two different things. And we can see that here in
9 the '091 patent at Figure 3 and Figure 6A. We can see that in
10 the '091 patent, Column 12, where it's describing what the
11 tuner does. And, again, in Column 1 -- 166 where it's talking
12 about what the television receiver or TV receiver does.

13 So, essentially, what they are trying to do is say
14 that the TV receiver, for example, in Claim 39, is limited to a
15 tuner embodiment.

16 And we can see that that's a problem when we look at
17 some of the other asserted claims in the related case. So in
18 the Vizio case, for example, and we'll see this in Phase II
19 Markman -- in the 6,649 patent at Claim 9, we see that there's
20 a claim where the television receiver and the tuner are two
21 different components.

22 And so this is the problem where they're trying to
23 conflate tuner and receiver so that in every single claim the
24 receiver has to be a tuner.

25 And one of the issues that came up in the "tuning"

1 term is this spec cite to digital data channels. And we can
2 see that Apple sort of came back and said, well, Your Honor, if
3 you look a little bit later in the next column over, you can
4 see that that same embodiment is still receiving a television
5 frequency transmission. And I think that's taking it a little
6 bit out of context.

7 Fran, if you can pull up Column 214.

8 So this is the '091 patent, and if we look one column
9 ahead to Column 214 of the two spec cites, the digital data
10 channels and then Apple's rejoinder on television frequencies.

11 If we can tune into 214 around Line 50, where it says
12 Figure 7C?

13 So we can see that the preface to the embodiments that
14 are being addressed says: Figure 7C illustrates methods for
15 monitoring multiple programming channels, selecting programming
16 and information of interest, and receiving said selected
17 programming and information.

18 So the next two columns are addressing embodiments
19 under this broader umbrella of receiving programming channels.
20 And one of those examples in the next column over talks about
21 digital data channels. That's the portion that Mr. Kline
22 referred to. And then there's a further discussion that talks
23 about television frequency channels.

24 But essentially, they're trying to narrow down a TV
25 receiver even narrower than a receiver that receives television

1 programming, which is essentially the alternate construction
2 that PMC proposed, and they're trying to say it's not that
3 broad, it's narrower, it has to receive television frequencies.

4 So that's the problem that the specification is
5 broader, it includes different embodiments, and they're
6 essentially trying to limit TV receiver to a single embodiment,
7 read out these digital data channel embodiments, and it's --
8 it's contradicted by this Column 214.

9 I'd also like to look at Column 229 at around Line 60.

10 And we can see here that there are discussions about
11 receiving data from a telephone or a remote data service
12 computer by means of a network. So, again, this is talking
13 about receiving information not limited to just television
14 frequencies, but from a tel -- a telephone or remote data
15 service computer.

16 And if we look at Figure 7C, we can again see that
17 there's an example or an embodiment of information that's
18 coming from a telephone or remote data service computer.

19 So I think that's the key dispute when it comes to
20 television receiver. And we agree with Your Honor that there's
21 no construction that's necessary. It's the plain and ordinary
22 meaning. But if the Court were to say we need to construe it,
23 it should be PMC's alternate proposed construction that it's an
24 electronic device that receives television -- excuse me, that
25 receives television programming. It's not that has to tune to

1 a television frequency.

2 And just, you know, one final comment I wanted to
3 make. There's been some discussion from Apple about a prior
4 ITC proceeding and a suggestion that the position that PMC is
5 taking here is inconsistent with the position it took there.

6 And, Fran, if you could actually turn to Slide 114,
7 please.

8 I think the key here is that the claim at issue in the
9 ITC proceeding was from a different patent, and it was a very
10 different claim. And we can see it on the left-hand side here.
11 The claim that was at issue in the ITC proceeding was Claim 44
12 of the '277 patent, and the preamble there recited a television
13 receiver system comprising. And then a television receiver was
14 essentially part of that television receiver system. And in
15 that case, there was a dispute about whether the television
16 receiver that was a component of the television receiver system
17 referred to, quote, the tuner portion of the television
18 receiver system or the display portion.

19 And so it's really taking the argument there out
20 context because that particular claim was drafted in a way that
21 the television receiver was a component of the receiver system.
22 And that's different from the way the claims are drafted in
23 this case.

24 In this case, in Claim 39, for example, we're talking
25 about a television receiver that does a number of things. And,

1 for example, we can see in the last limitation of Claim 39,
2 there's a displaying component, right? So the claims at issue
3 here are drafted differently than the claim that was at issue
4 in the ITC proceeding. The dispute in that case was a -- a
5 completely different dispute.

6 And so, Your Honor, we would just urge the Court that
7 we think that the Court's decision that no construction is
8 necessary is the correct one, but if a construction ultimately
9 results, it needs to be broad enough to fall under that
10 umbrella of an electronic device that receives television
11 programming. It should not be importing limitations that that
12 programming has to be received through a television frequency.

13 Thank you.

14 THE COURT: All right. Thank you, Ms. Godfrey (sic).

15 MS. ALBERT: Your Honor, we would like to briefly
16 address the terms "downloadable code" and "locating code."

17 And turn to Slide 144, please.

18 So the issue presented by these two terms is whether
19 the received code and the code that's located can include data
20 and instructions or is limited to instructions only.

21 And respectfully, Your Honor, the patent
22 specifications include embodiments where the code that's
23 located or downloaded can include both data and instructions.
24 For example, as -- as shown on Slide 145, Apple, in its brief,
25 relied upon an example of compiled machine language code as --

1 as confirming their position that the downloaded code or the
2 received code can be comprised of instructions only.

3 But, actually, the specification describes this
4 compiled machine language code as consisting of both computer
5 program instructions and data, as we see at Column 184, Lines
6 23 through 30 and 39 through 40 of the '091 patent.

7 So respectfully, Your Honor, a construction that would
8 limit the terms "downloadable code" and "locating code" to
9 instructions only would exclude some of the preferred
10 embodiments where the downloadable code consists of both
11 instructions and data.

12 Thank you, Your Honor.

13 THE COURT: All right.

14 MR. SERNEL: Marc Sernel on behalf of Apple again.

15 We think you've got this one right, Your Honor, in
16 your preliminary construction of "downloadable code" and
17 "locating code." Downloadable code is one or more instructions
18 received in a transmission from a remote source.

19 This begs the question of what code are we talking
20 about when we're looking at the context of these claims. And I
21 think Your Honor is all over this, based on the preliminaries,
22 but I just wanted to go through it quickly to make sure we know
23 what we're talking about here.

24 In terms of code, obviously, code can be -- when
25 you're referring to code, it can be machine language code or

1 source code, assembly language code, that type of code. There
2 are other kinds of codes, and those are things also referred to
3 in the patents as unique digital codes or unique identifier
4 codes, something like an ATM code or a pass code. These are
5 the same word used in two different ways, and we need to look
6 to the context of the claims to see how they are used.

7 And I think Your Honor focused in on this in -- in
8 adopting the preliminary construction, but as used in the
9 claims asserted in this case, it is clear that the code that
10 we're talking about is the type of source code, assembly
11 language code, essentially instructions, one or more
12 instructions, given the way the term is used in the claims
13 themselves.

14 You can see in Claim 18, it talks about locating code.
15 It doesn't say locating a code. It doesn't say locating one or
16 more codes. It says locating code. And my linguistic experts
17 on my team have taught me about things such as non-count nouns
18 and countable nouns. And when you're talking about source code
19 and machine code, that's what they refer to in linguistics as a
20 non-count noun.

21 An example of that would be sort of homework. You
22 don't say a homework. You don't say homeworks, two homeworks.
23 It's something that just always has the singular form. You
24 don't put a or numbers in front of it.

25 Different from a code or codes when you're talking

1 about a pass code or pin code type of thing. An example of a
2 countable noun that's similar to that would be an assignment.
3 You can refer to an assignment, assignments, two assignments.
4 And so when you look at the context of the claim language, and
5 that's where you start when you're doing claim construction, I
6 think Your Honor was right on in finding that what we're
7 talking about here is instructions. We're not talking about
8 data.

9 And essentially, what their construction attempts to
10 do is allow for the possibility where you're just going to have
11 data, you're not going to have instructions. Your
12 interpretation, I think, is -- is absolutely correct. It's one
13 or more instructions. Doesn't mean it can't have data. It
14 doesn't exclude it. But what we're talking about here is the
15 type of source code, machine code, a -- this non-count noun
16 version of code. We think your proposed preliminary
17 construction is absolutely correct, and you should stick with
18 it.

19 THE COURT: All right.

20 MR. KLINE: If we could turn to Slide 70, please.

21 Your Honor, this is -- we were all interested to see
22 an empty box in the preliminary ruling, which we take this to
23 mean this is a green field for the -- for the hearing.

24 So we're at 12 in your list, Your Honor, wherein the
25 use of said identified signal comprises information of the

1 passing of said identified signal on said step of -- of
2 passing.

3 Apple has contended that the claim is -- that term is
4 indefinite, and we certainly disagree with that. We largely
5 rest on our briefs, Your Honor, but with a blank square, I'm
6 eager to answer questions you may have.

7 I will point the Court to one section of the
8 specification that we think is helpful here. So this is Claim
9 14 of the '088 patent. And I'll say, Your Honor, you can see
10 the way we had arranged this on Slide 70 of our presentation,
11 because these two wherein clauses, as well as communicating
12 information on a use of said identified signal, they -- they
13 interact with one another in Claim 14 of the '888 (sic) patent.

14 And it's at the end of the claim where we talk
15 about -- toward the end, we're passing the signal from said
16 processor to the output port. And then where our bolding
17 begins: Wherein a way the signal is passed from said output
18 port is based on said step of identifying.

19 The next term is communicating information on a use of
20 said identified signal. And then the phrase we're discussing
21 right now: Wherein the use of said identified signal comprises
22 information of the passing of said identified signal based on
23 said step of passing.

24 I would direct the Court's attention -- and it's Slide
25 74 of our presentation -- do I have that right?

1 The '490 patent, Column 17, Lines 10 through 24,
2 there's an embodiment described -- part way down the paragraph,
3 in a predetermined fashion, signal processor 130 identifies and
4 marks the source of signals as coming from a device 139. And
5 that can be, Your Honor, making a decision based on said step
6 of passing.

7 Monitoring signal usage rather than programming usage
8 and viewership. So that's an example, Your Honor, where the
9 patent specification gives an explanation of what might be
10 meant by the term "wherein the use of said identified signal
11 comprises information of the passing of said identified signal
12 based on said step of passing." So, for example, the signal
13 may have come from a specific device.

14 I hope that's helpful, Your Honor.

15 THE COURT: Mr. Kline --

16 MR. KLINE: Yes.

17 THE COURT: -- is your position that we should
18 construe the -- the phrase "the use," which follows directly
19 wherein in that clause, as meaning information on the use?

20 MR. KLINE: My position has been, Your Honor, that the
21 claim needs no further...

22 Let me go back, if I can remind myself. We think it's
23 plain and ordinary meaning.

24 THE COURT: And you think the plain and ordinary
25 meaning is that it means information on the use?

1 MR. KLINE: I believe so, Your Honor, although I think
2 I have to reserve the right to be second guessed on that.

3 I think that's fine, Your Honor.

4 THE COURT: Well, if we don't add that language of
5 "information on," then how do you make literal sense of the --
6 of the phrase?

7 MR. KLINE: So, Your Honor, wherein the use of said
8 identified signal comprises information of the passing of said
9 identified signal based on said step of passing. So, I'm
10 sorry, Your Honor, where are you proposing to --

11 THE COURT: Well, my understanding was that at the
12 beginning of the wherein clause that you just read, where it
13 says, "wherein the use," you want us to construe that as
14 wherein information on the use?

15 MR. KLINE: Well, the claim itself says: Wherein the
16 use of said identified signal comprises information of the
17 passing of said signal. Where did it come from? When was it
18 passed? Things of that nature, Your Honor.

19 THE COURT: Well, which would be information on the
20 use?

21 MR. KLINE: Right.

22 THE COURT: So if we don't read in "information on,"
23 how do we make sense of the clause?

24 MR. KLINE: Well, I think because the clause itself
25 reads it in, Your Honor, wherein the use of said identified

1 signal comprises information of the passing of said identified
2 signal.

3 THE COURT: How does the use comprise information?

4 MR. KLINE: What time was it used? Where was it sent?
5 Things of that nature.

6 THE COURT: That's information on the use.

7 MR. KLINE: That's right.

8 THE COURT: Not about the use.

9 MR. KLINE: Right.

10 THE COURT: That's what I'm struggling with is how to
11 give literal effect to this because I'm not comfortable with
12 rewriting it.

13 MR. KLINE: And, I think, Your Honor, that if I
14 understand correctly your thought process, the notion that the
15 use includes information is already written within the claim.

16 THE COURT: Well, I just have trouble with how the use
17 can include information.

18 MR. KLINE: I'm sorry, Your Honor, I find myself just
19 reading the claim over and over again.

20 Communicating the claim term -- and perhaps it's
21 helpful to -- to look at the entire element rather than just
22 the wherein clause.

23 So what I'm doing, Your Honor, is I'm looking at 71,
24 but haven't given you the courtesy of putting it up for you.

25 THE COURT: I have the --

1 MR. KLINE: Okay.

2 THE COURT: -- claim in front of me.

3 MR. KLINE: Thank you.

4 So the last phrase, communicating information on a use
5 of said identified signal wherein the use of said identified
6 signal comprises information of the passing of said identified
7 signal. Where did the signal come from? What device did it
8 come from? What time was the signal passed?

9 In some embodiments, Your Honor, you may be familiar,
10 if you -- if you rent a movie from iTunes, you get a period of
11 30 days or so within which you are free to play the movie, or
12 it -- it expires. And once you begin to play the movie, you
13 have to play it as many times as you'd like within, I think, 24
14 hours. So tracking the time that the signal is noting that --
15 that it was downloaded and it is live for 30 days. When did we
16 begin to play the movie? 24 hours later, it expires, even if
17 it's sooner than 30 days. So the time that signals were passed
18 can be important. Where signals came from, where they were
19 passed to.

20 THE COURT: All of which would be information on a
21 use --

22 MR. KLINE: Yes.

23 THE COURT: -- which the opening clause identifies.
24 Are you contending that it was not a drafting error?

25 MR. KLINE: Yes, Your Honor. We don't contend that

1 this is a drafting error.

2 THE COURT: All right. All right.

3 MR. KLINE: Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Kline.

5 MR. SERNEL: Your Honor, Marc Sernel on behalf of
6 Apple.

7 I think the blank box that you had in your preliminary
8 constructions reflects that there is no sensible way to
9 construe this phrase. We believe it's indefinite, and in the
10 briefs, PMC suggested that it should be redrafted to make it
11 sensible and -- redrafted in one of the many ways it could be
12 redrafted to make it sensible. We think the Federal Circuit
13 law prohibits you from doing that, and we believe that the
14 proper finding here is that it's indefinite.

15 Here's the claim language. And, again, in the briefs,
16 what PMC argued was essentially that the use of said identified
17 signal is short for and essentially they suggested you should
18 read in language -- and actually two sets of language, both
19 information on, and then also this concept of collected in the
20 claims. And so I've -- I've redrafted the claim here in the
21 way that they would suggest you redraft it, by adding in
22 language "wherein information on the use," and then adding in
23 this concept of collected. That's what they're asking you to
24 do, redraft these claims to make them sensible.

25 As written, they are nonsensical. And there's just an

1 absolute mismatch, as Your Honor's questions indicate, between
2 the wherein the use and then what it's comprising. There are
3 ways to fix it, and, you know, one way that they suggest in
4 their brief, that's one way you could fix it. You could do
5 other things to, you know, avoid the mismatch and -- and kind
6 of have these things tie together, where instead of adding
7 information, you make the comprising use a use step.

8 And so this is not something that's subject to
9 reasonable certainty. It requires you to redraft it. There's
10 multiple ways you could fix it, but that's not your job to fix
11 claims. Your job is to construe claims.

12 And the Federal Circuit's very clear on these points.
13 Again, Courts may not redraft claims. That's what they're
14 asking you to do to try to sustain the validity of this, and we
15 don't think there is a proper construction of what is written
16 in a nonsensical way. There are ways to fix it, but that's not
17 proper claim construction. We believe the proper finding here
18 is indefiniteness.

19 THE COURT: Is there another reading of the clause
20 that you think is reasonable the way it's written other than to
21 understand it as referring to information on the use?

22 MR. SERNEL: Like I said, Your Honor, we sat there and
23 scratched our heads looking at this for a long time, as well.
24 We had a blank piece of paper as to what reasonably this could
25 mean. We came to the conclusion, there's just a mismatch.

1 And, again, there are ways to fix it, and -- and what
2 they've suggested here is one way to fix it, putting in that
3 information on would then make it sensible.

4 I think there are other ways. I could add a few
5 words, change things around, and fix it to -- to avoid the
6 mismatch and have the wherein part of that clause connect up
7 with the language that follows the comprising. And so where
8 you've got these multiple ways, you might be able to
9 rehabilitate --

10 THE COURT: Well, give me a for instance.

11 MR. SERNEL: For example -- yeah, again, the wherein
12 the use of, you could then have comprises use of passing of an
13 identified signal, or, again, it's just kind of connecting use
14 to use. That'd be a way to -- to fix this.

15 And so there's other ways. I could add three words
16 and -- and come up with different meanings that I think would
17 be sensible. But here as written, there's clearly a mismatch.
18 Mr. Kline acknowledges it's not a -- a drafting error. This is
19 apparently what they intended, but we believe it's absolutely
20 nonsensical as written, as Your Honor indicated in your
21 questions, and you should find it indefinite.

22 THE COURT: All right. Thank you, Mr. Sernel.

23 MR. SERNEL: Your Honor, we had -- we had talked
24 about -- there are two claims in which we argue indefiniteness,
25 and so the parties have agreed to -- to move on to that one out

1 of order. That's the term "stored function invoking data."

2 On this one, we -- Apple disagrees with your
3 preliminary construction. You did figure out a way to -- to
4 construe this one as stored data that invokes a function. We
5 believe this one is subject to multiple different possible
6 meanings.

7 The proper construction of this is not reasonably
8 clear, and so we believe that the proper finding on this one is
9 indefinite, as -- as well.

10 And so just to set the stage, this is how the term
11 appears in Claim 62 of the '649 patent. It talks about
12 comparing stored function invoking data. There is no other
13 reference to this term, "stored function" -- "stored function
14 invoking data" anywhere in the specification, and so there's no
15 explanation anywhere as to what this means. All we have is
16 this usage in Claim 62.

17 There was an effort in PMC's brief to point to
18 somewhat like terms. They pointed to terms, such as "control
19 invoking instructions," "controlled-function invoking
20 information." But those aren't stored function invoking data,
21 and don't address what we think is one of the unclear ambiguous
22 issues, which is what is exactly stored.

23 I'll note that when you look at controlled-function
24 invoking information in their brief and in the -- the quotation
25 from the specification, that is actually -- there's a dash

1 between controlled and function which helps explain what's
2 modifying what. We don't have that in the term in Claim 62.

3 So we think this term is not precise enough to meet
4 the Supreme Court's standard in Nautilus for indefiniteness.
5 And we believe there's at least three potential interpretations
6 on -- on the table here when you've got these multiple
7 adjectives and -- and nouns. What's modifying what, I think,
8 is -- is uncertain, and there's -- the three interpretations
9 are listed here. Data for invoking a stored function. Do we
10 have stored data for invoking a function or stored data for
11 invoking a stored function? What is stored modifying? We
12 think that's not clear from the claim language, and we have
13 no -- nothing in the specification to help us out.

14 In the -- in their brief, PMC started with -- and
15 their proposed construction was data stored in memory, and then
16 requiring the functions also be stored. And so it was going
17 with the third interpretation, which is actually different from
18 Your Honor's preliminary which just requires the data be
19 stored, not the function be stored.

20 In the reply brief, they then evolved to this second
21 interpretation, which is the data stored. The function is not
22 stored. You can see we asked both -- there's two inventors on
23 this patent. We asked them both this question, and we got two
24 different answers.

25 We had Mr. Harvey saying that stored is modifying

1 data, not function. That's consistent with what you've done.
2 Inventor Cuddihy, when reviewing the language, couldn't --
3 couldn't figure it out, and -- and couldn't provide us an
4 answer.

5 And so, again, I think the -- the standard under
6 Nautilus, it's a lot more rigorous than what we used to operate
7 in pre-2014. A patent must be precise enough to afford clear
8 notice of what is claimed, thereby apprising the public of what
9 is still open to them.

10 And we think that here where we don't know whether it
11 requires stored data, stored function, or both, that is not
12 giving us the clear notice that's required by the Supreme Court
13 and Federal Circuit case law. And we think this term is
14 indefinite.

15 THE COURT: All right.

16 MR. GRINSTEIN: You have Slide 61, please.

17 Your Honor, Joe Grinstein for PMC.

18 Just so the record is clear, the -- Ms. Bonn and
19 Ms. Xi and myself were on the PMC/Vizio case. This is a common
20 term between Vizio and Apple, so I'm here responding to Apple's
21 argument, which is also Vizio's argument, but that's why I'm --
22 I'm standing here right now.

23 THE COURT: All right. Mr. Grinstein, thank you.

24 MR. GRINSTEIN: Obviously, the dispute on this
25 particular term is whether or not the term "stored function

1 invoking data" is indefinite.

2 What the Defendants here have done is manufactured a
3 dispute essentially complaining that there's a lack of hyphens
4 in the claim term. They throw their hands up in the air and
5 say we can't figure it out, this claim term, because is it
6 stored function, hyphen, invoking data? Is it stored, hyphen,
7 function invoking data? Is it stored, hyphen, data for
8 invoking a stored, hyphen, function? Essentially because
9 there's no hyphens in -- in the claim language, their position
10 is it's indefinite.

11 I think counsel just made a hyphenation argument by
12 looking at the specification, and I think that the
13 specification is actually pretty illuminating in its use of
14 hyphens.

15 So, for example, the specification of the '091 patent
16 at Column 12 first uses the term "control invoking
17 instructions," and that makes it clear that we're talking about
18 instructions that invoke control. There's no use of hyphens
19 there. I don't think anyone suggests what that specification
20 passage is talking about is somehow uncertain or unclear,
21 despite the lack of hyphens.

22 The specification goes in a different particular
23 section of the '091 patent. Here we're at Column 143, and here
24 the specification does use a hyphen and says
25 "controlled-function invoking information." So now we know if

1 we want to modify the word "function," we can do so with a
2 hyphen. And that's what the patentee choose -- chose to do
3 right here, is modify the word "function" with the word
4 "controlled," and to make it clear that that word "function"
5 was being modified, a hyphen was inserted in front of
6 "controlled."

7 The patent specification goes on in Column 49, again,
8 of the '091 patent. Here we've got the phrase "preprogrammed
9 controlled-function-invoking information." Now, the patent
10 wants the word "preprogrammed" not to modify
11 controlled-function-invoking, but instead, to modify
12 information. And so in that situation, the patentee knows not
13 to use a hyphen and to use -- have the word "preprogrammed"
14 stand out by itself.

15 And that brings us to the claim language, which I
16 think also resolves this -- this particular dispute. The claim
17 language here is stored function invoking data. The patentee
18 chose not to put a hyphen between stored and function because
19 the patentee didn't want the word "function" to be modified by
20 the term "stored."

21 And importantly, when we look at this claim, the
22 Court's construction, which is a variation of our construction,
23 is the only construction that actually makes any sense in the
24 context of the claim because in this particular clause, we are
25 comparing stored function invoking data to the contents of said

1 at least one registered memory.

2 Well, where did that data come from? That is the
3 first time in this particular claim that stored function
4 invoking data is mentioned. It's not mentioned previously in
5 the claim. Where is this stored function invoking data coming
6 from? What is this data? Well, it's function invoking data
7 that has been pre-stored that is in the register memory -- or
8 that is pre-stored, and that's where we're getting this
9 function invoking data.

10 If we are to construe this clause in one of the ways
11 in which the Defendants say it can be construed, which is not
12 to say how they want it construed, but they're just saying
13 here's one of many alternate constructions, they would say, ah,
14 one of many alternate constructions is that we're talking now
15 about stored-function invoking data.

16 But where did this stored-function invoking data --
17 with a hyphen in between stored and function -- where did that
18 come from? We don't know. It makes its first appearance in
19 this comparing clause. We don't know where it's located. We
20 don't know where it came from.

21 Per the Defendants' construction, this particular data
22 is coming up out of the blue and has no grounding in the rest
23 of the apparatus. That, I submit, is not a plausible reading
24 of the claim. And it's not enough to create an indefiniteness
25 by clear and convincing evidence just to come up with some

1 implausible reading of the claim and say, well, here's another
2 way to read it, and since there's more than one way to read it,
3 therefore, there's no reasonable certainty, and the claim is
4 indefinite.

5 That's not enough to get over the clear and convincing
6 bar, and I think that's what the Defendants have offered. They
7 certainly haven't offered any actual evidence. They've not
8 offered the evidence of any claim -- of any inventor. We have
9 the testimony of the inventor, Mr. Harvey, who confirms the
10 same reading that PMC is proposing today. They don't have the
11 invent -- evidence from any expert. We've got evidence from
12 Mr. Weaver who's declaring that the -- the claim term is
13 amenable to construction.

14 So at end of the day, there's evidence on the PMC
15 side. There's attorney argument on the Defendants' side. I
16 don't believe that attorney argument rises to the level of
17 clear and convincing evidence sufficient to invalidate the
18 claim.

19 THE COURT: All right. Thank you, Mr. Grinstein.

20 MS. ALBERT: Your Honor, we're next going to address
21 the claim terms "processor" and "control processor."

22 And could I have Slide 99, please?

23 So both PMC and Vizio agree that the term "processor"
24 means a device that performs operations according to
25 instructions. And so the issues presented by the terms

1 "processor" and "control processor" are really whether these
2 devices operate on data or -- or have to operate on data in
3 accordance with instructions.

4 And a construction that a processor is -- is a device
5 that operates on data would be overly broad and could -- could
6 encompass devices that while they may operate on data, would
7 never be considered to be processors.

8 For example, a memory operates on data, but it
9 wouldn't be considered by a person of skill in the art to be a
10 processor. A keyboard operates on data, but it would never be
11 considered by a person of skill in the art to be a processor or
12 a control processor.

13 And turning to Slide 100, the specifications make
14 clear that processors operate on data by executing
15 instructions. And, for example, on Slide 100, we see an
16 excerpt from the '091 patent at Column 118, Lines 10 through
17 13, which indicates that executing said decrypt process and
18 meter-current-00-header-message instructions cause control
19 processor, 39J, then to transfer to decryptor the spam
20 information of the second message in the following fashion.

21 And if we look at the next slide, 101, we see that
22 the -- the 1987 specification at Column 8, Lines 34 through 39,
23 also indicates that in accordance with the present invention,
24 the signal processor detects signals, and in accordance with
25 instructions in the signals and preprogramming in the signal

1 processor, decrypts and/or records and/or control station
2 apparatus by means of the signal and/or discards the signals.

3 So these excerpts from the specification make clear
4 that in the context of the present invention, the processors
5 operate on data according to instructions. And we believe that
6 a construction that would disregard the requirement for
7 operating on data in accordance with instructions would sweep
8 in devices that persons of skill in the art would never
9 consider to be processors or control processors.

10 THE COURT: Ms. Albert, in the Zynga matter, didn't
11 PMC tell the Court that this term was not limited to
12 instructions?

13 MS. ALBERT: It did, Your Honor. I believe that was a
14 different patent with different claim terms, but it's clear
15 that in the -- in the context of these claim terms, the
16 processors are required to operate on data in accordance with
17 instructions.

18 THE COURT: How different was that patent?

19 MS. ALBERT: I can't remember the patent number that
20 was in that case.

21 THE COURT: Was it from this specification?

22 MS. ALBERT: It is from this specification, yes, Your
23 Honor.

24 THE COURT: And isn't that where the -- where you're
25 saying I should look to determine the meaning of processor?

1 MS. ALBERT: Yes, Your Honor. But as we've shown, the
2 specification describes the processor as operating on data in
3 accordance with instructions.

4 THE COURT: And aren't there also examples in the
5 specification that are not described to be executing
6 instructions?

7 MS. ALBERT: I don't believe there are instructions in
8 the specification where a processor would process data that --
9 that wouldn't be responsive to some sort of instruction.

10 THE COURT: All right. Let me take a look. Now,
11 it -- Column 19, Line 14 to 16, talking about the decoder
12 described in Figure 2B? I think that's one that was cited to
13 us before as involving processing but not a requirement of
14 executing instructions.

15 MS. ALBERT: Your Honor, could you -- what was your
16 citation, Your Honor?

17 THE COURT: 19, 14.

18 MS. ALBERT: 19, 14.

19 THE COURT: 19.

20 MS. ALBERT: And, Your Honor, in that Figure 2B,
21 the -- the radio decoder does include controller 44, which is a
22 processor that operates in accordance with instructions.

23 THE COURT: But that -- the figure is not talking
24 about that. It's talking about the decoder that detects and
25 processes signal information.

1 MS. ALBERT: Well, if you see the -- the line,
2 there -- there is a possibility in that figure of the
3 controller communicating with the radio decoder 44. There's an
4 arrow drawn from controller 44 back to radio decoder 42. So it
5 does receive instructions from the controller.

6 THE COURT: And what is your explanation for why you
7 would represent to the Court in the Zynga matter that it's not
8 limited to -- that this specification does not limit
9 processor to executing instructions and now you're saying it
10 does?

11 MS. ALBERT: I would need to look in the context of
12 the claims that were at issue in the Zynga case and compare it
13 to the claims at issue in our case, but with respect to the
14 claims that are at issue in our case, it's PMC's position that
15 those claims require that the processor operate on data in
16 accordance with instructions.

17 THE COURT: Tell me what it is about those claims that
18 differentiates that processor from other processors addressed
19 in the specification.

20 MS. ALBERT: There are requirements for controlling
21 the decryption, for example. With respect to Claim 14 of the
22 '088 patent, for example, that claim requires a processor that
23 is programmed to perform a number of different functions,
24 including identifying a signal, passing a signal, communicating
25 information on use.

1 THE COURT: So your representation is that all of the
2 claims asserted here that contain processor are different from
3 the claims that were at issue in the Zynga matter in that
4 regard?

5 MS. ALBERT: I don't know if I can make the
6 representation about all of the claims without looking at the
7 claims that were at issue, but I would represent that the
8 claims at issue in this matter do require that the processor
9 operate in accordance with instructions.

10 THE COURT: All right.

11 MS. ALBERT: Thank you, Your Honor.

12 THE COURT: Thank you, Ms. Albert.

13 MR. MERKIN: Your Honor, Joel Merkin on behalf of
14 Apple.

15 Just a few quick responsive points on the construction
16 for processor.

17 Slide 105 is where Apple identifies just a few of
18 the examples in the specification. I think you alluded to one
19 of them, Column 19, where there are plenty of examples in the
20 spec that do describe processors that are not limited to
21 being -- operating according to instructions, the signal
22 decoder. Even counsel for PMC said it's possible maybe for
23 instructions, but it doesn't require instructions to be
24 operated according to.

25 The cite under that, you'll see the EOFS, the end of

1 file signal valve, processes things like buffers and
2 comparators are described in PMC's specification as processing.
3 I can go on and on.

4 So there's plenty of items in PMC's specification that
5 clearly do not operate according to instructions.

6 I also want to direct your attention to Slide 103.
7 Actually, it wasn't just the Zynga case that PMC previously
8 took the position that processor doesn't need to be performed
9 on operations according to data and instructions. You can see
10 in Slide 103, this is actually the Amazon case. It's not
11 before this Court. It was before the Delaware court. PMC's
12 own proposal was just very similar to this Court's prior
13 construction -- any device capable of performing operations on
14 data. That, again, applied to two different PMC patents, the
15 '304 patent and the '749 patent.

16 The '304 patent and '70 -- '749, identical spec. The
17 '304 patent is even so close to the claims at issue in the
18 Apple litigation that Apple has a pending motion to dismiss
19 based on collateral estoppel issues related to the '304 patent.
20 So there's no real argument. I guess PMC previously took the
21 position it doesn't need to be -- operate on data according to
22 instructions.

23 Also, I want to just quickly draw your attention to
24 Slide 102. The PTAB very recently considered this, too. This
25 is March 2006, and also agreed processor is just a device that

1 operates on data. So everyone has -- everyone who's considered
2 a dispute has consistently found processor in PMC's
3 specification is not limited to operating according to
4 instructions.

5 Your Honor, I'd like to turn to -- turn to the next
6 term on the list, the "instruct-to-enable signal" term.

7 THE COURT: All right.

8 MR. MERKIN: On Slide 110, you'll see the dispute here
9 is whether the word "instruct" should be read out of the term
10 "instruct-to-enable signal."

11 Instruct-to-enable signal, it's a term that is not
12 used in PMC's specification. Apple simply proposed a plain
13 meaning construction, intended to clarify this rather unusual
14 term. We weren't try to be tricky here. This is
15 instruct-to-enable signal, and Apple's proposed construction,
16 which we continue to contend should be the adopted
17 construction, is simply a signal that provides an enabling
18 construction. We tried to highlight here on Slide 11 (sic),
19 just for consistency between the actual language of the term
20 and Apple's proposed construction.

21 Now, PMC complains -- I'm on Slide 112 -- that Apple's
22 construction for the word "instruct-to-enable signal" includes
23 the word "instruction," and instead, proposes a construction
24 itself that amounts to simply a -- a signal that has enabling
25 information.

1 Now, that's similar to what the Court included in its
2 proposed and preliminary construction. The Court's preliminary
3 construction, a signal that enables the implementation of the
4 enumerated operation. So the word "instruct" that's included
5 in Apple's proposed construction, that comes straight from the
6 term. It's an instruct-to-enable signal.

7 In fact, if you look on Slide 112, we've shown Claim
8 26 of the '091 patent. This claim distinguishes an
9 instruct-to-enable signal from simply enabling information.
10 You can see the claim recites detecting the presence of an
11 instruct-to-enable signal. That's what is at -- is at issue
12 here.

13 Separately, there's an issue of receiving enabling
14 information. I submit that the claim -- Court's preliminary
15 construction, which does not include the word "instruction,"
16 seems to be reading out the notion that the
17 instruct-to-enable signal is a signal that does provide an
18 instruction.

19 Slide 113, you'll see this is the portions that -- of
20 the specification that PMC has cited to. And if you read this
21 closely, in all these instances it refers to instructions.
22 Typically, they're enable WSW, which stands for Wall Street
23 Week instructions. So really, all parts of the specification
24 that PMC is pointing to that could support instruct-to-enable
25 signal, again, the term isn't -- itself isn't used in the

1 specification, all refers to it using instructions.

2 Lastly, Slide 114, you see, again, this was just over
3 a year ago in the Amazon case pending in the District of
4 Delaware for a -- a different term in a different patent, but
5 that used the word "instruct signal," which is part of a
6 process of instruct-to-enable signal. This included instruct
7 signal. PMC proposed to the Court that instruct signal means a
8 signal including an instruction or series of instructions, dot,
9 dot, dot.

10 So it seems like instructions need to be included
11 within the construction for an instruct-to-enable signal.
12 Simply calling it a signal that enables something and doesn't
13 specify that the instruct-to-enable signal is a signal that
14 provides an enabling instruction would read out the term
15 "instruct" from the term.

16 THE COURT: Do you dispute that there are instruct-to
17 terms in the specification that don't include or require
18 instructions?

19 MR. MERKIN: So, Your Honor, I believe there are other
20 instruct signals not present in these claims. For instance, I
21 recall instruct to decrypt signals which likewise would in --
22 be a -- you know, just regurgitating kind of a plain meaning, a
23 signal that provides an instruction to decrypt. Here we're
24 talking about an instruct-to-enable signal. And, again, it
25 would just be a signal that provides an enabling instruction.

1 So I don't believe there's instruct signals in the
2 specification that actually wouldn't be instructions. A signal
3 that instructs essentially is an instruction.

4 THE COURT: All right. Thank you, Mr. Merkin.

5 MS. ALBERT: Turn to Slide 124, please.

6 Your Honor, we agree with the Court's proposed
7 construction that an instruct-to-enable signal is a signal that
8 enables the implementation of an enumerated operation.

9 And if you do refer to the specification, you'll see
10 that the instruct-to-enable signal is not limited to
11 instructions. It's a signal that's broadly comprised of
12 information that enables the execution of instructions.

13 For example, turning to Slide 125, we see here an
14 example from the 1987 specification in the '091 patent at
15 Column 156, Lines 4 through 9, that describe the enabling
16 message as being comprised of SPAM information. So that's
17 information. It doesn't require that it be instructions. And
18 that SPAM information enables the detector to detect digital
19 information of the message and the controller to process the
20 information.

21 And turning to Slide 126, we see at Column 148, Lines
22 56 through 62, a description of an instruct-to-enable signal
23 called: Please-fully-enable-WSW-on-CC13-at-particular-8:30
24 information. Again, the -- the patent specification uses the
25 term "information" to describe this instruct-to-enable signal

1 that then causes the controller 20 to select particular
2 WSW-on-CC13-at-particular-8:30 information in the received
3 information and record the selected information at memory and
4 then execute particular
5 receive-authorizing-info-at-appointed-time instructions.

6 So, Your Honor, PMC agrees with the Court's proposed
7 construction and believes that the instruct-to-enable signal
8 should not be limited to a construction that would require that
9 it be instructions.

10 Thank you.

11 THE COURT: All right.

12 MS. XI: Your Honor, Meng Xi on behalf of PMC.

13 On message stream, which is No. 18 on the tentative
14 order, we noticed that the Court rejected all the parties'
15 proposed constructions, and instead construed message stream to
16 include signal processing information.

17 We just want to make clear on the record today that
18 the tentative construction of signal processing information
19 does not exclude digital video and audio signals.

20 For example, let me direct the Court's attention to
21 Claim 51 of the '2,649 patent.

22 Could we go to Slide 93?

23 MS. XI: This claim discloses that digital television
24 signals are included in said message stream, and I will note
25 that this is consistent with the Court's tentative construction

1 for Claim Term No. 22, digital television signals, which
2 include both digital video -- video signals and digital audio
3 signals.

4 Now, Vizio also makes a big deal in its opposition
5 brief at Docket No. 160 that PMC's expert, Dr. Weaver, could
6 not point to a place in the spec that describes television
7 signals are messages. But as the Court is aware, extrinsic
8 evidence may not contradict intrinsic evidence, and the
9 intrinsic evidence here is clear that digital television
10 signals can include or can be included in a message stream.

11 Anticipating Defendants' arguments, Your Honor, I'd
12 like to shift gears to talk about PMC and Apple's dispute that
13 message stream is a series of data packages that -- that comes
14 down to just one word for the dispute, whether these data
15 packages could be analog or if they are fully digital.

16 Can we go to Slide 81 for that? We're on Slide 81.

17 Figure 2I from the spec shows one configuration of a
18 message stream. It's got padding bits, commands,
19 information -- information segments, and the file signals and
20 others. But the use of bits, which is highlighted on that
21 slide, is a telltale sign that the message -- message stream is
22 digital, as opposed to analog.

23 This is because there are major differences between
24 digital and analog signals. A digital signal, which is in red
25 here, has a discrete value at each time sampling point. And an

1 analog signal is a continuous smooth signal that contains
2 time-varying quantities.

3 It's undisputed -- well, these are undisputed. On
4 this graph here that you see voltages plotted on the vertical Y
5 access and time runs along the horizontal X axis, each of the
6 vertical lines represent a time sampling point. The blue
7 analog signals are smooth and continuous because there are an
8 infinite number of possible values for the signals at each time
9 sampling point. And the red digital signals with their finite
10 set of possible values will look angular and rigid as the
11 signals try approximate values at each time sampling point.

12 Now, with that in mind, the terminology used for
13 digital signals is very important here. As any computer
14 programmer can tell you, a digital signal has binary states on
15 or off, high or low, 1 or 0. There is no in between.

16 Digital signals are thus represented by bits, which is
17 a con -- contraction of the word "binary" and "digits"
18 themselves. When someone says bits, someone is talking about
19 something digital, as opposed to analog.

20 Further, in computer programming terminology, a bit is
21 typically a single element of code, 0 or 1. A byte is 8 bits.
22 It could be, you know, four 0s followed by four 1s or eight 1s,
23 or it could be eight 0s. And, finally, a word is a unit of
24 manipulation made up of bits.

25 So going back to Slide 82, the use of -- the usage of

1 bits here is very telltale, that we're talking about digital
2 signals.

3 Also, if you look at Figure 2J, we've got more
4 description and more uses of the word "byte" and "word," which
5 are significant here for the reasons stated. And same thing
6 elsewhere in the specification. We've got first bit of one
7 header to the last bit in the bolded passage. And, again, this
8 shows that message streams are digital, not analog. If we were
9 talking analog, we wouldn't be using bits.

10 So Apple should not be allowed to assert that message
11 streams can be analog, and that's why we would urge that you
12 keep the construction that specifies that such message streams
13 are digital by using the word "bits."

14 THE COURT: I mean, this -- this construction is a
15 definition from your specification.

16 MS. XI: Yes. And the specification actually uses
17 SPAM, signal processing apparatuses and methods --

18 THE COURT: Uh-huh.

19 MS. XI: -- in place of signal processing. And, I
20 mean, the -- yes, that is -- that is from -- that's straight
21 from the spec.

22 THE COURT: You want it to say SPAM?

23 MS. XI: We said SPAM in the spec, but we wanted to
24 make sure that the Court is not excluding digital video signals
25 and digital audio signals in its tentative construction.

1 THE COURT: The -- how is that the issue that's
2 presented?

3 MS. XI: I was just anticipating what Apple was going
4 to come up here and argue over the audio -- analog versus
5 digital issue. But I could -- I could sit down and wait to
6 respond until Apple makes that.

7 THE COURT: All right. That'd be fine, Ms. Xi. Thank
8 you.

9 MS. XI: Great.

10 MR. MCBRIDE: Good morning, Your Honor. Kevin McBride
11 on behalf of the Vizio Defendants.

12 Your Honor, with respect to message stream, we believe
13 that the Court's preliminary construction is acceptable, and we
14 have no objection to it.

15 I think the main issue that I'd like to respond to is
16 PMC's counsel's submission that the construction somehow allows
17 for the inclusion of digital video, digital audio, or digital
18 television signals within the message stream. And counsel
19 relies on Claim 51 of the '2,649 patent.

20 But Claim 51 is not part of the intrinsic record, Your
21 Honor. As Your Honor noted, we have a very clear glossary
22 definition, taken right from the specification, ratified in the
23 prosecution history, and that is the intrinsic record which
24 should be persuasive here.

25 A later written claim has to accept claim

1 constructions as they're laid out and defined in the intrinsic
2 record. We can't be rewriting the specification or the
3 glossary to save a claim. I think counsel for Apple referred
4 earlier to the general principles that we shouldn't be
5 fashioning claim construction with an eye towards saving an
6 otherwise invalid claim.

7 And I will acknowledge that Claim 51 appears to lack
8 support in the specification and -- and lack written
9 description.

10 I did ask PMC's expert in his deposition, Dr. Weaver,
11 if it's true that the Harvey specification does not disclose
12 any examples in which television signals are embedded in the
13 message stream.

14 And he agreed with me: I believe that's correct.

15 So -- and we cited that in our brief, Your Honor. So
16 it seems wholly inappropriate to try and redo the glossary to
17 save a later written claim which itself lacks written
18 description.

19 I have no further comments.

20 THE COURT: All right. Thank you, Mr. McBride.

21 MS. XI: May I respond?

22 THE COURT: Yes, you may.

23 MR. SHAH: Your Honor, Archit Shah on behalf of Apple.
24 I just wanted to address one issue which I think might clarify
25 the presentation.

1 THE COURT: All right.

2 MR. SHAH: Counsel for PMC has referred to Figure 2I
3 and Figure 2J in discussing the structure of the message
4 stream. The -- to the extent Your Honor has adopted the
5 glossary as a -- a construction, I just point out that neither
6 counsel for PMC, nor Vizio, has argued that the -- Figure 2I is
7 limiting or the definition is an exemplary embodiment.

8 And the construction from the glossary that Your Honor
9 has adopted refers to bits at the beginning and end of a
10 message. There's no particular aspect of that construction
11 that addresses the rest of the content of that message. And so
12 I'm just responding to counsel for PMC's position that the
13 message stream would be all digital.

14 With that, we have no further comments on message
15 stream.

16 THE COURT: All right.

17 MS. XI: Your Honor, it's black letter law that claims
18 are part of the spec, and the claim language is intrinsic
19 evidence here, which is part of the patent. The claim has been
20 asserted in this case, 51, against the Defendants, and it has
21 been charted, as well.

22 We're not trying to undo the glossary, and the reason
23 that Claim 51 is coming up at all is because Vizio wants to
24 limit message stream to control information only. And control
25 information excludes digital video signals and audio signals.

1 And I like to turn to Slide 92.

2 Vizio's proposed construction tries to replace
3 messages with control information, and that's just not right.
4 Claims 39 and 54 of the '2,649 patent each discloses control
5 information as being a part of a message stream. To select
6 control information in said at least a first portion of said
7 message stream and to select control information in said
8 message stream.

9 So it would be completely nonsensical to select
10 control information in control information.

11 The Court should not adopt a proposed construction
12 that's nonsensical.

13 Also, being part of a message stream means that
14 control information does not have to be the entire message
15 stream or even the message. These terms are simply not
16 synonymous.

17 Vizio's proposed construction is overly simplistic for
18 a message to include only control information all of the time.

19 We would like the Court not to replace message with
20 control information.

21 THE COURT: Thank you, Ms. Xi.

22 MR. SHAH: Thank you, Your Honor. Mr. Shah for Apple.
23 Next term on the list is register memory.

24 And, Mr. Kim, if you could turn to Slide 121. Yeah.
25 Your Honor's proposed construction and the parties

1 agree that register memory temporarily stores information for
2 later use in operations. The question is whether register
3 memory can be any temporary storage or is limited to temporary
4 storage in a processor consistent with the specification and
5 the way the term is used in -- in the patent in the claims.

6 Register memory refers to storage in a processor and
7 not other types of memory described in the -- PMC's
8 specification.

9 THE COURT: And what do you rely upon to limit it to
10 processor?

11 MR. SHAH: Let me jump to Slide 125, which I think
12 will provide explanation for -- provide the context for the
13 specification.

14 The specification -- specification discusses random
15 access memory, buffers, read only memory, and these are in --
16 highlighted here in Figure 3A.

17 If we can go to the next slide.

18 What the specification further does is specifically
19 distinguish RAM-type memory, random access memory, from -- from
20 register memory. And you can see here that -- sorry, if we can
21 go to the next slide.

22 So looking at '091 patent at Column 33 there, register
23 memory is distinguished from RAM capacity. And the particular
24 embodiment that's being discussed here describes having three
25 different memory locations. These locations could be in

1 register memory, or they could be in RAM -- in a RAM-type
2 memory. And that is consistent with Figure 3A.

3 If we could go back to --

4 THE COURT: How does that distinction turn on whether
5 register memory is in a processor or not?

6 MR. SHAH: That distinction clarifies that register
7 memory is not synonymous with RAM memory and that RAM memory is
8 distinct from register memory. The --

9 If we could turn back to Slide 125.

10 What we see here is the other types of memory
11 described in PMC's specification are illustrated separate from
12 the processors. What's not illustrated here is the register
13 memory, precisely because it's contained in the processors
14 depicted here.

15 So if I look at, for example, the green highlighting
16 RAM under 39B, there's a processor for error correction. It
17 has RAM memory. It has ROM recommend. It's connected to
18 buffer memory. Register memory need not be depicted because --
19 precisely because it is within the processor. And the same
20 would be true for the control processor 39J that is depicted on
21 the right side of Figure 3A.

22 That's also consistent with the way the term is used
23 elsewhere in the specification if we looked at Slide 122.

24 The microprocessor is specifically designed to have
25 register memories, the -- the register memories of the control

1 processor and the register of the CPU and other designated
2 processors.

3 THE COURT: Can you point to anything that limits
4 register memory to a processor?

5 MR. SHAH: I think all of these depict the
6 understanding of those of skill in the art that register memory
7 is the -- distinguished from the types of memory that are
8 separate from processors. This is the type of memory that's
9 associated with the processor. It's consistent with the
10 specification cited here, as well as well as what's -- what's
11 in the file history where it discusses -- this is on Slide 123,
12 It's cited in our brief -- the control based on processor
13 register memory, and the context for this -- this particular
14 amendment in the '649 file history is to overcome a double
15 patenting rejection, and they're discussing how the '649 patent
16 relates to the -- the processors that are involved in -- in
17 processing the -- the signals in PMC's invention.

18 And, finally, I think we have -- you know, we've also
19 cited to the -- the testimony of the Inventor Harvey, and this
20 is on Slide 124. And he generally agreed, at the time of the
21 inventions, going back to the 1980s, the processor is -- is
22 within the -- the register memory is in the processor itself.

23 THE COURT: Usually and generally, is that the best
24 you got?

25 MR. SHAH: I mean, this is the extrinsic evidence. I

1 think consistent with the Figure 3A, the way the terms are
2 used. The -- the issue with the broader definition that
3 Your -- Your Honor has proposed is precisely that it
4 encompasses other types of memory, such as RAM memory, which
5 are separate from the processor and specifically distinguished
6 in the specification.

7 And this is why -- again, turning to Slide 127 -- you
8 know, the -- the text of the specification distinguishes
9 register memory from RAM memory. But Your Honor's proposed
10 construction would encompass RAM memory within -- within the --
11 the separately described register memory.

12 THE COURT: All right.

13 MR. GRINSTEIN: Your Honor, let me just simply
14 respond.

15 If I could actually have Defendants' Slide 125, I'd
16 appreciate that. Thank you very much.

17 It seemed like Defendants' entire argument comes down
18 to the idea that in the -- say, the control processor -- oops,
19 can't quite use the laser pointer on the TV. But it -- the RAM
20 memory and the ROM memory are depicted as being outside the
21 control processor, and so, therefore, we need a construction of
22 register memory as memory being inside a processor so as to
23 distinguish RAM and ROM memory.

24 But actually this Figure 3A from the patent depicts
25 RAM and ROM memory as being inside the processor. 39J right

1 there is referred to in the patent specification. If you look
2 at Column 118, Lines 10 through 13, 39J is referred to as the
3 control processor. So that entire big square, all three
4 subcomponents within that big square, are the processor, and
5 RAM and ROM are being depicted here as being within the
6 processor.

7 So even if Defendants got their construction of
8 inserting in the processor as being a limitation on register
9 memory, that wouldn't exclude RAM and ROM memory anyway because
10 the patent specification, this figure itself, depicts RAM and
11 ROM as being within the processor, all of which just goes to
12 show that their particular limitation, the additional
13 limitation they want to insert in a processor is not
14 appropriate here.

15 THE COURT: Do you contend that register memory should
16 encompass RAM?

17 MR. GRINSTEIN: I think it can encompass RAM. I don't
18 think it -- it necessarily excludes it. I think there's a
19 possibility that it could encompass it. And at the end of the
20 day, it's a functional-type of situation. It's not a
21 specific structure, but it's a function. What does the
22 register memory do? And Your Honor's construction has defined
23 register memory in terms of its function, not in terms of
24 specific type of memory, but in terms of its function, it's a
25 particular type of memory that temporarily stores instructions

1 for later use.

2 THE COURT: All right.

3 MR. GRINSTEIN: Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Grinstein.

5 Anything further on that?

6 MR. SHAH: Your Honor, I'd just note that counsel for
7 PMC appears to argue that it wouldn't make a difference if
8 in -- the processor's added to the construction with respect to
9 random access memory, and to the extent they're happy to
10 concede that in -- in the processor should be part of the
11 construction of register memory, we'd be happy to agree with
12 that.

13 THE COURT: I don't construe his argument that way.

14 MR. GRINSTEIN: It wasn't, Your Honor.

15 THE COURT: Okay. Any further argument? No?

16 MR. MERKIN: Your Honor, Joel Merkin on behalf of
17 Apple. I'd like to address two terms together that Apple has
18 the same issues with respect to the terms. The terms are
19 "digital television signals" and "digital video signals."

20 Apple's dispute with the preliminary constructions for
21 both of those terms are whether digital signals are limited to
22 entirely digital signals, or do they encompass signals with
23 some digital information?

24 The claims at issue state television signals are
25 digital. They do not state that -- that television signals are

1 entirely digital.

2 If you look at Slide 131 and compare that with other
3 claims that are at issue in this litigation -- these are,
4 again, PMC patents, same specification, related patent, the
5 '635 patent, there are claims that describe digital information
6 transmission. And then in that case, because digital
7 information transmission may include some digital information,
8 the claim expressly states it's unaccompanied by any
9 non-digital information transmission.

10 Now, we don't have that in these claims. When they
11 recite digital television signals, PMC knew how to and could
12 have said unaccompanied by any non-digital television signals.
13 It's simply not present in the claims.

14 The part of the specification that PMC relies on for
15 its digital video and digital television constructions is
16 Example 7 where it simply states: So-called, quote, unquote,
17 digital video and, quote, unquote, digital audio well known
18 in the art. But entirely digital television and entirely
19 digital video were certainly not well known in the art in the
20 1980s.

21 Looking at Slide 133, PMC's inventor, Inventor
22 Cuddihy, explained in 1987, any -- any video that was entirely
23 digital in its format was of an experimental nature.

24 Similarly, PMC's expert, Dr. Weaver, in the 1980s:
25 Digital -- digital television would have been experimental?

1 Unequivocal response: Yes.

2 With the spec being quite unclear as to exactly the
3 scope of digital television signals and digital video signals,
4 it's important here for this term, look at the file history to
5 see what was actually argued by PMC, see how the examiner
6 responded to those arguments, and see what PMC continued to
7 say.

8 Here on Slide 135, you'll see PMC initially argued
9 that digital television included digital video and digital
10 audio. The date of when PMC argued that was January 27th,
11 1997. They were attempting to overcome prior art, and PMC was
12 making the statement to try to get around prior art in the
13 final history.

14 In response to that statement, the examiner -- this is
15 on the bottom part of Slide of 135 -- said -- he maintains that
16 the descriptions found in applicant's original disclosure
17 pertaining to the transmission of digitally formatted
18 television signals were at best confusing.

19 Certainly didn't seem clear to the examiner that
20 PMC's -- what they're saying is a clear statement, that's all
21 digital was actually digital.

22 Following this later in prosecution, there's a very
23 clear and unequivocal statement by PMC. This is now dated
24 October 2, 1998, a quote shown on Slide 136. Reading the
25 context of this, it says: Television programming transmission

1 is disclosed to be comprised of a digital -- excuse me, a video
2 portion, an audio portion, and an -- embedded encoded digital
3 signals.

4 It goes on to say -- this is PMC's statement during
5 prosecution: The audio portion, video portion, and signal
6 portion of the television programming transmission may be
7 entirely or partially encoded in digital information thereby
8 comprising digital television.

9 PMC expressly stated it can be entirely or partially
10 encoded in digital format thereby comprising digital
11 television.

12 We see a similar statement on the next slide. This is
13 from the same file history amendment that PMC was making in
14 October 1998, later than the previous statements we're looking
15 at, where the television programming transmission is disclosed
16 as containing embedded encoded digital signals that generate
17 television programming.

18 The '81 case discloses that television programming
19 transmission, including digital signals, and thus being
20 digital television. This is completely consistent with
21 Apple's proposed construction that digital television
22 signals are not necessarily entirely digital signals, but are
23 digital -- excuse me, television signals that include digital
24 information.

25 MR. KLINE: Thank you, Your Honor. I think I can go

1 through this rather quickly.

2 I think we're at Slide 52.

3 We largely rest on the briefs with respect to the --
4 with this issue, Your Honor. We just have a couple of comments
5 about the remarks that counsel for Apple made.

6 What's important -- pardon me -- at the outset to
7 focus on, in our view, is that the term that we are construing
8 is digital television signal and digital video signal, not
9 information transmission, not broadly digital television, or
10 digital television transmission, but rather the claim terms are
11 digital television signals and digital video signals.

12 With respect to Claim 39, for example, of the '649
13 patent, the term "digital television signal" shows up in the
14 context of the clause receiving an information transmission,
15 including digital television signals and a message stream.

16 The patent describes -- for example, the '091 patent
17 describes, for example, Column 48, Lines 13 through 16, that a
18 television signal that consists of so-called digital video and
19 digital audio were well known in the art.

20 I'll come to it later, and we certainly dispute --
21 there was plenty of references cited on the face of the patent,
22 Your Honor, that are entitled digital television. So people of
23 ordinary skill in the art at the time these applications were
24 filed were familiar with the concepts of digital video and
25 digital audio.

1 During prosecution of the '649 case -- and we'll talk
2 about this somewhat in some more detail -- there's an Office
3 Action -- the original -- as originally filed, applicant's
4 disclosure lacks any specific description.

5 There's a recognition, though, that digital television
6 signals and digital video signals are, in fact, digital. As to
7 how the transmission circuitry of applicant's used to carry out
8 said recited methods was specifically modified and/or
9 configured for the purpose of handling digital television
10 signals.

11 There was an issue, Your Honor, whether the '81
12 specification disclosed -- sufficiently disclosed digital
13 television signals.

14 In response, and I think counsel for Apple referred to
15 some of this material. In response, PMC submitted a paper
16 explaining -- these are PMC's words -- that the '81 case does,
17 in fact, disclose the television programming transmission,
18 including digital signals and thus being digital television.

19 But, again, Your Honor, we're not construing here
20 digital television. We're construing digital television
21 signals.

22 So television programming transmission, including
23 digital signals. At the TV signal decoder, the selected
24 frequency of the programming transmission is then transmitted
25 through Paths A, B, and C. We've seen this Figure 2A, Your

1 Honor, from the '091 patent before. This is the decoder
2 depicted in Figure 2. It's shown here in more detail in
3 Figure 2A, and it shows that the signal is split into three
4 paths.

5 This portion of the specification describes that the
6 programming transmission is then transmitted through Paths A,
7 B, and C to three separate digital detector devices, 34, 37,
8 and 38. We've talked quite a bit about those over the course
9 of the day.

10 Turning to the next slide, this is -- this is the
11 document that Apple refers to. It's Exhibit 26 of their brief,
12 and it comes from the '649 patent prosecution history. It
13 notes that digital detector 34 -- again, this is PMC explaining
14 the '81 specification -- digital detector 34 decodes encoded
15 signal information in the line portion or portions of the
16 analog video portion of the television programming
17 transmission. Digital detector 37 determines whether a
18 particular encoded signal is present in the audio portion, and
19 then digital detector 38 receives a separately defined and
20 clearly digital transmission.

21 So digital detector 38 receives a separately defined
22 and clearly digital transmission of. That phrase "separately
23 defined" comes up several times on the next slide, Your Honor,
24 which is a continuation of this portion of the document that
25 PMC cited -- submitted to the Patent Office where they

1 explained since the television programming transmission is
2 disclosed to be comprised of a video portion, an audio portion,
3 and embedded encoded digital signals -- again, there's the word
4 "signal," Your Honor -- the separately defined transmission is
5 at least some of the television programming transmission that
6 contains the encoded digital signal.

7 What we have, Your Honor, is Path C in Figure 2A,
8 which is described as a clearly digital transmission and that
9 it is separately defined. When we go on to Slide 57, we say
10 that the embedded code -- encoded digital signals, the
11 separately defined transmission is at least some of the
12 television programming transmission that contains the encoded
13 digital signals.

14 Now, counsel for Apple went on to focus on the next
15 sentence. Thus, it is disclosed that the audio portion, video
16 portion, and signal portion of the television programming
17 transmission -- that's the television programming transmission,
18 may be entirely or partially encoded in digital format
19 separately defined from the analog format. The digital signals
20 themselves, Your Honor, are separately defined from the analog
21 format, and they are entirely digital.

22 So the claim construction proposed is correct that
23 television program in which the video and audio -- digital
24 television signals are programming in which the video and audio
25 are transmitted as digital video signals and digital audio

1 signals. It's the signals that we're defining, Your Honor, not
2 the transmission overall.

3 Thank you.

4 THE COURT: All right. Thank you, Mr. Kline.

5 MR. MCBRIDE: And, Your Honor, Kevin McBride for the
6 Vizio Defendants.

7 If I might, just a couple quick comments. First of
8 all, both counsel for Apple and counsel for PMC have alluded to
9 enablement issues. We think enablement is an issue for another
10 day and doesn't really affect the claim construction issues
11 that we're faced here.

12 With respect to the Court's preliminary construction,
13 we have no objection to it. The only -- we have no objection
14 to it. The only additional response I might make to Apple's
15 presentation beyond what counsel for PMC has stated is that in
16 connection with the specification -- if I could have the ELMO
17 on? Zoom in on that. Thank you.

18 At -- I think counsel for PMC referred to the
19 Example 7 in the specification, the Wall Street Week example,
20 transmitted in digital form. And that's a long -- there's a
21 long discussion in that example, but at one part, in Column
22 154, starting at Line 57 through Line 64, it talks about how
23 the digital transmission is ceased and the receiving station
24 commences receiving television information as conventional
25 analog television and to prepare to receive particular embedded

1 SPAM information at the decoder 30.

2 If we were to adopt Apple's construction here and
3 allow for digital television to encompass analog with some
4 digital information embedded in it, then this would probably
5 say ceasing to receive digital television and commencing to
6 receive digital television. It would become nonsense.

7 So the specification in this example clearly draws a
8 distinction between digital television as being completely
9 digital in terms of audio and video and conventional analog
10 television which could have some digital information embedded
11 in it.

12 Thank you, Your Honor.

13 THE COURT: All right. Thank you, Mr. McBride.

14 MR. MCBRIDE: Your Honor, in the progression of
15 issues, we skipped over the term "multimedia." We had -- we
16 Vizio had offered a construction on that. I note in the
17 Court's preliminary construction, you referred only to the '088
18 patent, and so I guess my question is, were you intending that
19 we -- we Vizio save our arguments on multimedia for Phase II,
20 or would you like to hear us on this?

21 THE COURT: I -- I am construing the term "multimedia
22 signals," not multimedia.

23 MR. MCBRIDE: We had multimedia presentation in --

24 THE COURT: So, yes, my intent would be that we'll
25 revisit other "multimedia" terms when we get to Phase II.

1 MR. MCBRIDE: All right. Thank you, Your Honor.

2 THE COURT: All right.

3 MR. KLINE: I get the pleasure of saying I think we're
4 done, Your Honor, unless you have more that you'd like to talk
5 about.

6 THE COURT: I think that's good.

7 Mr. Everingham, you as well?

8 MR. EVERINGHAM: Your Honor, I believe that
9 completes the claim construction issues that were calendared
10 for today. There is a pending procedural motion in the Vizio
11 matter that deals with a number of asserted claims.

12 We had suggested in our papers that because everyone
13 was going to be here, it might be an opportune time to address
14 it now, but given the hour, I would certainly -- I'm not --
15 I'm not advocating that it be heard today, but if we could
16 perhaps set a telephone conference to address those issues in
17 the near future, it might help the parties streamline those
18 issues.

19 THE COURT: All right. I'll take a look at that and
20 see if we should proceed in that fashion.

21 MR. EVERINGHAM: Understood. Thank you, Your Honor.

22 THE COURT: Thank you. And we are adjourned.

23 LAW CLERK: All rise.

24 (Hearing concluded.)

25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and
correct transcript from the stenographic notes of the
proceedings in the above-entitled matter to the best of my
ability.

9 /S/ Shelly Holmes
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